92-1265

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030
(713) 796-2540

Pro Se

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030
(713) 796-2540

Pro Se

QUESTIONS PRESENTED

1. Were Petitioners denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed? Is the Texas Election Code Section 251.003 constitutional? Did the hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constitute lack of access to the court and an obstruction of justice?

2. Was Petitioner Bette R. Schwager deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 when she was not allowed to prosecute her claims and defend herself against the taking of her property?

3. Were Petitioners denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case when the court of appeals struck 43 of Appellants' 44 points of error for procedural defects?

4. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas? Were Petitioners denied the benefit of the final judgment entered in their favor on Oct. 14, 1986? (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Were

Petitioners denied their constitutional rights by the Texas courts assessing judgment against them without jurisdiction?

5. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court?

Note: *Schwager v. Texas Commerce Bank, N.A.*, 813 S.W.2d 225 (Tex. App.—Houston 1991) (per curiam). This case was stated in the U.S. Supreme Court Judicial Highlights November 1991, page ix West Supreme Court Reporter Vol. 112 November 1, 1991 No. 1.

PARTIES TO THE PROCEEDINGS

Pursuant to the Texas Rules of Appellate Procedure, Petitioners certify that the following is a complete list of the names of all parties:

PETITIONERS:

Bruce Schwager, Bette Schwager,
B.B.M.M., Ltd., and B.M. Bayou Corporation
2001 Holcombe
Houston, Texas 77030

RESPONDENTS:

Dr. Malcolm Marcoe
6630 DeMoss Suite A
Houston, Texas

Dr. Harvey Resnick
201 Oak Drive
Lake Jackson, Texas

Fred Fallas
9306 Cliffwood
Houston, Texas

Texas Commerce Bank, N.A.
712 Main
Houston, Texas

Charles Best
3803 Lost Oak
Spring, Texas

Meyer Fallas
9431 Denbury
Houston, Texas

William Cramer
9902 Balmforth
Houston, Texas

ATTORNEYS:

Bruce B. Schwager Bette R. Schwager *Pro Se*
2001 Holcombe, Apt. 806
Houston, Texas 77030

Mr. Robert Axelrad
1990 Post Oak Boulevard
14th Floor
Houston, TX 77056-3814

Texas Commerce Bank
Charles Best

Mr. Newton B. Schwartz
Schwartz, Berger & Valdez, P.C.
723 Main Street
Suite 325
Houston, TX 77002

Harvey Resnick

Mr. John Zavitsanos
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Texas Commerce Bank
Charles Best

Ms. Cynthia G. Farris
Baker & Botts
One Shell Plaza, 910 Louisiana
Houston, TX 77002-4995

Texas Commerce Bank
Charles Best

Mr. Neil S. Levin
Suite 710
4828 Loop Central Drive
Houston, TX 77081-2212

Fred Fallas, Meyer Fallas,
Malcolm Marcoe,
William Cramer

Mr. Joseph D. Cheavens
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Texas Commerce Bank
Charles Best

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF AUTHORITIES x

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT CONSTITUTIONAL PROVISIONS 2

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE AND FACTS 5

REASONS FOR GRANTING THE WRIT 11

1. Petitioners were denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed. The Texas Election Code Section 251.003 is unconstitutional. The hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constituted a lack of access to the court and an obstruction of justice 11

Page

2. Petitioner Bette R. Schwager was deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 as she was not allowed to prosecute her claims and defend herself against the taking of her property 15

3. Petitioners were denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case as the court of appeals struck 43 of Appellants' 44 points of error for procedural defects 18

4. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas. Petitioners were denied the benefit of the final judgment entered in their favor on Oct. 14, 1986. (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Petitioners were denied their constitutional rights by the Texas courts assessing judgment against them without jurisdiction 22

5. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to

Page

support their opinion along with the allowed perjury by the trial court 26

CONCLUSION 28

APPENDIX "A": Newspaper Articles - Campaign Contributions Legalized Bribery A-1

APPENDIX "B": Ruling Texas Supreme Court, 9/9/92 . . B-1

APPENDIX "C": Ruling Texas Supreme Court, 10/28/92 . . . . . C-1

APPENDIX "D": Judgment 1st Court of Appeals, 3/12/92 . . . . . D-1

APPENDIX "E": Incorrect and Inconsistent Statements . . E-1

APPENDIX "F": Documents Showing Finality of 86-07376 Judgment F-1

APPENDIX "G": S.F. Hearing, 5/26/87 . . . . . G-1

APPENDIX "H": List of Authorities Submitted to Texas Supreme Court H-1

APPENDIX "I": Newspaper Article: Texas Justice for Sale I-1

APPENDIX "J": Newspaper Article: Law Firm Top Donors to Justices J-1

APPENDIX "K": Newspaper Article: Selecting Our Judges K-1

		Page
APPENDIX "L":	Answer to Action of Trial Court	L-1
APPENDIX "M":	Answer to 1st Court of Appeals Order 2/24/92	M-1
APPENDIX "N":	Bette Schwager's Detailed Argument ..	N-1
APPENDIX "O":	Judgment Case #87-14551	O-1
APPENDIX "P":	Respondents' Trial Pleading	P-1
APPENDIX "Q":	Verification	Q-1
APPENDIX "R":	Argument for Finality of 86-07376 Judgment	R-1
APPENDIX "S":	Texas Election Code	S-1
APPENDIX "T":	Arguments for Conspiracy & Perjury ..	T-1
APPENDIX "U":	Constitutions and Statutes	U-1
APPENDIX "V":	Order Striking 42 Points of Error 2/24/92	V-1
APPENDIX "W":	Judgment Case #86-07396	W-1
APPENDIX "X":	Campaign Contribution Report	X-1
APPENDIX "Y":	Opinion Affirming Judgment Cause #87-14551, 3/12/92	Y-1
APPENDIX "Z":	Newspaper Article: There are better ways to finance judicial races than the way we do in Texas	Z-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. McCurry, 101 S. Ct. 411 (1980) 25

Armstrong v. Manzo, 380 U.S. 545 (1965) 21

Armstrong v. Manzo, 85 S. Ct. 1187 (1965) 15, 28

Asher v. Swenson, Warden, 397 U.S. 436 (1970) 26

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 18

Barber v. Connolly, 5 S. Ct. 357 (1885) 8, 27

Billington v. Undernood, 613 F.2d 91 (CA 5 Ga. 1980) 12

Bounde v. Smith, 97 S. Ct. 1491 (1977) 15

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451 (1930) 27

Brown v. Felsen, 99 S. Ct. 2205 (1979) 26

Burnham v. Superior Court of California, 110 S. Ct. 2105 (1990) 24

Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F.2d 1180 (11th Cir. 1991) 26

Craig v. Carson, 449 F. Supp. 385 (1979) 17

Page

Crest v. Lane, 745 F.2d 476 *cert. denied*, 105 S. Ct. 2146, 471 U.S. 1068, 85 L. Ed. 2d 503 17

Dirt, Inc. v. Mobile County Com'n, 739 F.2d 1563 (1984) 15

Douglas v. People of State of California, 83 S. Ct. 814 (1963) 22, 25

Drum v. Nasuti, 648 F. Supp. 888 (E.D. Pa. 1986) 25

Estin v. Estin, 68 S. Ct. 1213 (1948) 16

Evitts v. Lucey, 469 U.S. 387 (1985) 21

Fay v. Noia, 83 S. Ct. 822 (1963) 18

Federated Dep't Stores, Inc. v. Moitie, 101 S. Ct. 2424 (1981) 26

Fink v. O'Neil, 106 U.S. 272 26

Fuentes v. Sherin, 92 S. Ct. 1983 (1972) 2

Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) 17

Haag v. Cuyahogu County, 619 F. Supp. 262 (D.C. Ohio 1985) 29

Johnson v. Mississippi, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971) 14

Page

Kremer v. Chemical Const. Corp., 102 S. Ct. 1883 (1982) 26

Leis v. Flyn, 439 U.S. 438, 99 S. Ct. 698 (1979) 23

Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982) 18, 22

Logan v. Zimmermann Brush Co., 455 U.S. 422 (1981) 21

Mathews v. Eldridge, 424 U.S. at 333, 96 S. Ct. at 901, 47 L. Ed. 2d at 32 18

McKane v. Durston, 153 U.S. 684 (1894) 21

Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S. Ct. 279, 49 L. Ed. 2d 683 (1976) 14

North Ga. Finishing, Inc. v. Di Cheng, Inc., 419 U.S. at 607, 95 S. Ct. at 722, 42 L. Ed. 2d at 757. 17

Okison v. Tolley School Dist. No. 25 Renville County State of N.D., 760 F.2d 864 *reversed*, 766 F.2d 378 17

Patterson v. Coughlin, 761 F.2d 886 *cert. denied*, 106 S. Ct. 879, 474 U.S. 1100, 886 L. Ed. 2d 916 17

Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 1778, 29 L. Ed. 2d 83 (1972) 14

Page

Rinaldi v. Yeager, 86 S. Ct. 1497 (1966) 22, 25

Schweiker v. McClure, 102 S. Ct. 1665 (1982) 15

Sea-Land Services, Inc. v. Gaudet, 94 S. Ct. 806 (1974) 24

Sec. Cox v. State of Louisiana, 85 S. Ct. 476 (1965) 15

Thomas v. Washington Gas Light Co., 100 S. Ct. 2647 (1980) 11

Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124 (1921) 27

United States v. Mendoza, 104 S. Ct. 568 (1984) 9

Williams v. Oklahoma City, 395 U.S. 458 (1969) 22

Williams v. Oklahoma City, 89 S. Ct. 1818 (1969) 22

Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) 14

Zenith Radio Corp. v. Hazeltine Research, Inc., 89 S. Ct. 1562 (1969) 17, 18

Page

STATE CASES

Abbott Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971) 9

Beard v. Graft, 801 S.W.2d 158 (Tex. App.San Antonio 1990) 10

Citizens State Bank v. Caney Investments, 746 S.W.2d 477 (Tex. 1988) 8, 23

Crampton v. Dep't of State, 395 Mich. 347, 235 N.W.2d 352 (1975) 14

Davis v. City of San Antonio, 752 S.W.2d 518 (Tex. 1988) 19

Fergurson v. Fergurson, 338 S.W.2d 945 (Tex. 1960) 5, 8

Gentry v. Credit Plan Corporation of Houston, 528 S.W.2d 571 (Tex. 1975) 8

Houston-American Finance Corporation v. Travis, 343 S.W.2d 323 (C.A. Tex.--Dallas 1960) 20

Hunt Production Co. v. Burrage, 104 S.W.2d 84 (C.A. TexasDallas 1937) 25

Inpetco, Inc. v. Texas American Bank, 729 S.W.2d 300 (Tex. 1987) 4, 19

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986) 21

Page

Matthews Const. Co., Inc. v. Rosen, 796 S.W.2d 692 (Tex. 1990) 9, 10

Murray v. Milner, 118 Mich. App. 352, 325 N.W.2d 422 (1982), *rev'd*, 419 Mich. 872, 348 N.W.2d 6 14

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) 21

Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986) 19

Salvaggio v. Brazos Cty. Water Control, 598 S.W.2d 227 (Tex. 1990) 18

Secrest v. Secrest, 649 S.W.2d 610 (Tex. 1983) 26

Starnes v. Holloway, 779 S.W.2d 86 (Tex. App.Dallas 1989) 16

Strong v. Pontiac Gen. Hosp., 419 Mich. 872, 347 N.W.2d 696 (1982) 14

Tarango v. Liberty Mut. Fire Ins. Co., 823 S.W.2d 717 (Tex. App.El Paso 1992) 10

Trans-State Pavers, Inc. v. Haynes, 808 S.W.2d 727 (Tex. App.Beaumont 1991) 16

Waters-Pierce Oil Co. v. State, 106 S.W. 326 (Tex. 1907) 23

Weaver v. Southwest National Bank, 813 S.W.2d 481 (Tex. 1991) 19

Page

Williams v. Khalaf, 802 S.W.2d 651 (Tex. 1990) 19

STATUTES

U.S. Const. amend. 5 . . . . . 2, 14, 15, 16, 17, 18, 22, 26, 29

U.S. Const. amend. 14 . . . 2, 8, 14, 15, 16, 17, 18, 22, 26, 29

28 U.S.C. § 1257. 28 U.S.C. § 2403(b) 2

Tex. Const. art. I § 3 . . . . . 2, 11, 15, 18, 22, 26

Tex. Const. art. I § 13 . . . . . 2, 11, 15, 16, 18, 22, 26

Tex. Const. art. I § 14 . . . . . 2, 15

Tex. Const. art. I § 19 . . . . . 2, 11, 15, 16, 18, 22, 26

Tex. Const. art. 5, § 8 . . . . . 2, 25

Tex. Civ. Prac. & Rem. Code Ann. § 51.014(1) (Vernon Supp. 1992) 2, 25

Texas Election Code Title 15 Chapter 251 § 251.003. . . . . 2, 11, 30

Page

MISCELLANEOUS

Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, Law & Social Change 91, 91 (1992) 14

Banner, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 *Stanford Law Review* 449 14

Black's Law Dictionary, 5th Edition, page 1261 11

Carlson, *Mandatory Supersedeas Bond Requirements: A Denial of Due Process Rights?*, 39 Baylor L. Rev. 29 (1987) 21

Hill, The Texas Plan: Merit Selection of Judges in Committee of 100, *The Texas Plan: Merit Selection of Judges* (1986) 14

Jackson & Riddesperger, Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court, 74 *Judicature* 184 (1991) 14

Schotland, Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy, 2 *Journal of Law and Policy* 57 (1985) 14

The Ultimate Injustice: When a Court Misstates the Facts, 11 Cardoza Law Review 1313 (1990) 28

TRCP #1 19

Page

TRCP 266 10

TRAP 74(f) 20

TRAP 74(o) 20

TRAP 74(p) 19, 20

TRAP 83 . . . . . 19, 20

TRAP 133(a) 9, 10, 20

1203 Texas Bar Journal, Dec. 1987 24

1207 Texas Bar Journal, Dec. 1987, footnote 47 21

32 South Texas Law Review 131-135 10

75 Corpus Juris Secundum 692 § 29 24

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioners respectfully request that a Writ of Certiorari issue to review the Orders of the Texas Supreme Court in this case.

OPINIONS/ORDERS BELOW

The Order of the Texas Supreme Court, upon Petitioners **Motion for Rehearing**, was decided Oct. 28, 1992 (Appendix "C"). The Order of the Texas Supreme Court upon **Application For Leave To File Application For Writ Of Error** was entered Sept. 9, 1992 (Writ Denied). (Appendix "B"). The Opinion of the

Texas Court of Appeals was entered March 12, 1992. (Appendices "D" & "Y"). The Opinion of the 1st Court of Appeals was entered Feb. 24, 1992 (striking 42 of 44 Points of Error) (Appendix "V"). The Judgment of the Harris County District Court was entered on 12-8-89. (Appendix "O"). The judgment in Case #86-07376 was entered on Oct. 14, 1986 (Appendix "W."

JURISDICTION

The Order of the Texas Supreme Court overruling Petitioners' motion for rehearing was entered on 10/28/92. This Petition for Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. 28 U.S.C. § 2403(b) may be applicable. Issues presented in this petition have been previously submitted to the Texas 1st Court of Appeals and/or the Texas Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th and 14th Amendments to the U.S. Constitution, Art. 1 §§ 3, 13, 14 & 19, and Article 5 § 8 of the Texas Constitution. Texas Civil Practices & Remedy Code Ann. § 51.014(1) Vernon Supp. 1992. (Appendix "U"). Texas Election Code Title 15 Chapter 251 § 251.003. Appendix "S."

PRELIMINARY STATEMENT

The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of that choice and protect only the ones that by its own lights are necessary. *Fuentes v. Sherin*, 92 S. Ct. 1983, 1999 (1972).

Middle-class Americans who have been wrongfully denied their constitutional right of liberty and property are just as entitled to access to this Court as an habitual criminal. Middle-class Ameri-

cans of any color or creed who have been stripped of their dignity, liberty or property and forever precluded from owning and enjoying property are as devastated as a habitual criminal would be having to spend time incarcerated. *Neither case should be allowed to exist.* Petitioners pray that the U.S. Supreme Court *at least* review their Petition for Writ of Certiorari and issue an opinion.

This Petition for Writ of Certiorari is made to correct the **MANIFEST INJUSTICE** (Black's Law Dictionary, 5th Edition, pages 707 and 867) perpetrated on "Schwagers" by the courts of the State of Texas. Also, the Petition gives the U.S. Supreme Court the opportunity to show voters in Texas that it has the courage and conscience to reverse an unjust ruling (Sept. 9, 1992). Recent articles in the Houston Chronicle and Post have indicated that the Texas Supreme Court can be purchased by large campaign contributions from banks, insurance, and other large corporations. (Appendices "I," "J" & "K").

U.S. Supreme Court Justice Sandra Day O'Connor has stated that her home state of Arizona had changed from partisan selection to an appointment/merit election and that the quality of the judiciary had improved 100 percent. Justice O'Connor said that this change also solved the need for campaign contributions from attorneys. Appendix "K-3".

As one of the largest banks in the State of Texas, "TCB" is a respondent in this case and is represented by Baker & Botts, one of the largest defense law firms in Texas. A once-in-a-lifetime opportunity existed for the Texas Supreme Court to show the world that there is equal protection under the law for a citizen of the State of Texas regardless of their status.

In the letter from the Texas Supreme Court which was **NOT SIGNED** by any of the sitting Judges of this Court or any Judge for that matter, the notation was made "Writ Denied." (Appendix "B"). These two words destroyed the lives of two upright, long-term citizens of the State of Texas. No opinion was issued by the Texas Supreme Court to support its erroneous decision. The lack of a Judge's signature and an opinion to support "Writ Denied" tends to support the accusations made about the Texas Supreme Court's refusal to equitably dispense justice. Appendix "I".

It is evident from the actions of the Texas Supreme Court that it did not issue an opinion to support its ruling as there was not a just, fair, equitable and impartial argument to be made to support "Writ Denied." The court also violated its mandate to correct rulings that if left standing would constitute a serious departure from the established law or introduce a doctrine violative of fundamental principles. 1203 Texas Bar Journal, Dec. 1987.

It is incredible that the Texas Supreme Court has ruled that the lower courts have made errors but the "Schwagers" did not matter enough to have the judgment against them reversed or that the issues were not important to the jurisprudence of the State of Texas. Certainly, **JURISDICTION** is a **FUNDAMENTAL PRINCIPLE**.

The admission of error by the Texas Supreme Court, without a special opinion, will only create the problems similar to those created by the court's ruling in *Inpetco*. 32 STL 131-135 South Texas Law Review. **THE SANCTITY OF FINAL JUDGMENTS MUST BE PRESERVED.** Voters have the right to know if a judgment in their favor or against them is final or not. The final judgment issued in favor of "Schwagers" on Oct. 14, 1986, Case #86-07376 (Appendix "W", was ruled not final **SIX (6) YEARS LATER** by Justice Murray Cohen, First Court of Appeals on March 12, 1992. Appendix "Y-5".

The Texas Supreme Court's ruling has only had the effect of justifying trial court judge Don Wittig's statement prior to trial that he was *not* going to let the "Bank" lose the case. (Motion for Sanctions and Gag Order 1st Court of Appeals 8-22-91). This judge knowingly allowed perjury to be committed in his court, and allowed other wrongful acts as demonstrated by documents submitted in the First Court of Appeals and the Texas Supreme Court. The Supreme Court of Texas has also confirmed the action of Appellate Court Judge Murray Cohen who should have recused himself "sua sponte" as he was a personal friend of one of the parties to this action (H. Resnick). Further, Justice Cohen usurped the authority of the Texas Supreme Court and the State Legislature by deciding which Rules of Appellate Procedure are valid and which should be disregarded so as to deny Appellants their

constitutional right of appeal. (Ruling Feb. 24, 1992 and March 12, 1992). (Appendices "V" and "Y"). **These rulings struck 43 of Petitioners' 44 points of error for procedural defects.**

It was unconscionable for Judge Cohen to state in his opinion (Appendix "Y-3") that breach of fiduciary duty was not tried in Case #86-07376. The record clearly and irrefutably shows that breach of fiduciary duty was tried. The trial judge Michael O'Brien in Case #86-07376 stated that breach of fiduciary duty was tried. **At the trial of Cause #86-07376 on July 22, 1986 the trial judge, Michael O'Brien, stated the following: S.F. 102 "Again I think your argument here goes to that Breach of Fiduciary Duty Argument." S.F. 104. He's alleging you breached your fiduciary by the General Partner unilaterally changing the terms of the lease that exists between the two entities. Whether you had the power to do it is a legal interpretation for me based on the evidence."** The 1st Court of Appeals was required to review the pleadings and evidence in Case #86-07376 to determine if the judgment was final. *Fergurson v. Fergurson*, 338 S.W.2d 945, 946, 947 (Tex. 1960). This duty was clearly *shirked* by the 1st Court of Appeals and the Texas Supreme Court.[1]

STATEMENT OF THE CASE

This lawsuit involves a conspiracy between TCB and the Limited Partners of B.B.M.M., Ltd. to defraud the General Partner, Bruce B. Schwager of his 50% interest in the Partnership. Appendix "T."

These claims were made against TCB and the Limiteds in the TRO obtained on March 27, 1987 by Bruce B. Schwager. "Schwagers" were the true Plaintiffs in the case before the trial court in Case #87-14551 (consolidated case) as they were in Case #86-

---

[1]Bruce Schwager was tried for breach of fiduciary duty allegedly committed in January of 1986 at the trial of Case #86-07376 in July of 1986. After all issues of law and fact were submitted, he was found ***not*** guilty. He was retried for this breach of fiduciary duty during the trial in November of 1989 (87-14551) and found guilty.

07376. Schwager was not only unable to obtain a judgment against TCB and the Limiteds, but sustained a judgment against them in favor of TCB for approximately $775,000 and in favor of the Limiteds for approximately $1,300,000. This was a reprehensible outrage based on the facts and law of this case which *were not* ruled on by the First Court of Appeals and the Texas Supreme Court. TCB had no standing to sue Schwager after it breached the contract by wrongfully accelerating the Promissory Note and the Limiteds breached the Partnership Agreement by not making payments as required in January 1987. Appendices "L-3" & "E-3." At the hearing held on March 9, 1987, the Limited Partners' attorney, Joseph Cohen, stated: "The investors, Limited Partners are not in position financially to invest or contribute any additional funds to the partnership at this time because of the uncertainty in the economy and the lack of a prospective purchaser at the present time for the partnership assets, and because of that they will not be making any additional contributions to the partnership." **Note: No claims of any wrongdoing by Bruce B. Schwager were made as a reason for stopping contributions.** This case turned on the alleged secret amendment to the lease, an issue that was thoroughly litigated in Case #86-07376, a trial held in July of 1986 which included the rights of TCB on this issue. (S.F. Hearing July 14, 1986 Testimony of Steve Smith, pp. 70-73). These four pages of testimony only pertained to the changes in the lease. *See also* statements made by Judge O'Brien "P-6" this document. Once the jury determined that Schwager committed wrong (breached contract and fiduciary duty) in January 1986 (Jury Issue #22 Tr. 1243), anything that happened after that point would be ruled against Schwager. Breach of contract and breach of fiduciary duty were the grounds for the requested dissolution of the Partnership by the Limiteds in the 1986 case. (Appendix "P"). The court stated in the judgment in Case #86-07376 (Appendix "W") the following: "A jury trial having been waived and all issues of fact and law having been submitted to the court and the court having considered the evidence: issues the following judgment: 1. It is ordered that the request of Defendants for a dissolution of B.B.M.M., Ltd. is denied."

The judgment against "Schwagers" was the direct result of the violation of law allowed by the trial court judge and is void for lack of jurisdiction. The following are the errors committed by the trial judge, Don Wittig.

1. Trial judge erred by consolidating Case #86-07376 with Case #87-14551 and retrying Case #86-07376.
2. Trial judge erred by holding a materially unfair trial.
3. Trial judge erred by allowing jury issue on fraudulent inducement.
4. Trial judge erred by refusing to submit jury issues on good faith, wrongful acceleration, forgery, conspiracy, breach of contract. (Jury could only conclude Bruce Schwager was lying).
5. Trial judge erred by denying that, as a matter of law, TCB had committed usury.
6. Trial judge erred by refusing to admit documentary evidence of fraud and conspiracy. Perjury was thus committed.
7. Trial judge erred by allowing a "Judge" to testify for TCB and Limiteds while refusing to allow a "Judge" to testify for Schwagers.
8. Trial judge held impermissible bias and prejudice.
9. Trial judge entered improper judgment.
10. Trial judge erred by denying Schwager's constitutional right to jury trial on contempt.
11. Trial judge erred by denying Schwager's directed verdict on no evidence and insufficient evidence.
12. Trial judge erred by ruling that Bruce B. Schwager was guilty of conversion.

Note: The above Points were contained in Appellants' Opening Brief 6/17/91 filed in the 1st Court of Appeals.

The Texas Supreme Court had an inescapable duty to make an independent evaluation of Petitioners' Application for Writ of

Error. Encompassed in this evaluation is a review of the entire record which includes the Petitioners' Application for Writ of Error and Petitioners' Reply Brief. "It is mandatory that the Court review the pleadings and evidence in determining the finality of the judgment." *Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). *See also Gentry v. Credit Plan Corporation of Houston*, 528 S.W.2d 571, 576 (Tex. 1975).

It is evident from the initial ruling made by the Texas Supreme Court that it did not fulfill its mandate but just paraphrased **BAKER & BOTTS'** opinion made on page 44 of its Response Brief filed 7/20/92 which states the following:

"Therefore this Application for Writ of Error presents no important legal issue that deserves the consideration of this Court." Why did "TCB" expend in excess of $1,000,000 in attorneys' fees if this statement was true? (Motion for Sanctions and Gag Order 1st Court of Appeals 8-22-91). Clearly, this case is important to the citizens of Texas and "Petitioners." All persons should be equally entitled to pursue their happiness and acquire *property* and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and *protection of property* redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuit by others under like circumstances; that no greater burden should be laid upon one than are laid upon others. *Barber v. Connolly*, 5 S. Ct. 357 (1885).

When the **"BANK"** in *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477 (Tex. 1988), complained about the rulings of district and appeals courts that the appointment of a receiver gave the trial court continuing jurisdiction over a case in which a judgment was rendered after a conventional trial on the merits. **THE TEXAS SUPREME COURT RULED THAT THE JUDGMENT WAS FINAL AND THE TRIAL COURT DID NOT HAVE JURISDICTION.**

HOWEVER, WHEN PRIVATE CITIZENS OF THE STATE DEMAND EQUAL PROTECTION UNDER THE SAME LAW, THEY ARE DENIED THEIR CONSTITUTIONAL RIGHTS. Tex. Const. art. I § 3. U.S. Const. amend. 14.

The **SANCTITY OF FINAL JUDGMENTS IS TO BE PRESERVED, NOT PERVERTED.** *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990).

In order to properly address the disagreement with the Texas Supreme Court on the nature of the case, the following quote from TRAP 133(a) is made: "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has correctly declared law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state as to require correction, the Court will deny the application with the notation "Writ Denied."

It is incredible that the Texas Supreme Court did not perceive the following issues as important.

1. Jurisdiction
2. Fundamental Error
3. Sanctity of Final Judgment
4. Due Process - (Bette Schwager denied her right to prosecute her personal claims)
5. Jury Issues
6. Right to Have Appeal Reviewed for Merit
7. Res Judicata - (Bruce Schwager tried twice for breach of fiduciary duty)

   The Latin phrase "res judicata means that the matter has been adjudged; a thing judicially determined; or a matter settled by judgment. **THE PRINCIPLE OF RES JUDICATA IS AN OLD ONE FOUNDED UPON PUBLIC POLICY.** *Abbott Laboratories v. Gravis*, 470 S.W.2d 639 (Tex. 1971).

   Under res judicata a final judgment on the merits bans further claims by parties or their privets on the same cause of action. *United States v. Mendoza*, 104 S. Ct. 568, 571 (1984).

8. Enforcement of Final Judgment

9. Receiverships - (No receivership appointment can now be made without making judgment interlocutory)

10. Right to Present Case First - Tex. R. Civ. P. 266 (1st Court of Appeals did not rule on this issue as presented by Petitioners. Supreme Court has also failed to rule on this issue)

The Texas Supreme Court was shown in *Tarango v. Liberty Mut. Fire Ins. Co.*, 823 S.W.2d 717, 718 (Tex. App.—El Paso 1992), different appeals courts disagree with the interpretation of the ruling "Writ Denied." Also, this case shows that if the appeals court feels that the matter "is of such importance to the jurisprudence of the state, that we interpret the Supreme Court's refusal to grant a writ in that case to be *tacit pronouncement* that the general rule will apply." (Emphasis added). The conflict of opinion between appeals courts, 32 STL 131-135 South Texas Law Review, and the conflict between Supreme Court rulings require this Court to issue a detailed opinion. *See also Beard v. Graft*, 801 S.W.2d 158, 173 (Tex. App.—San Antonio 1990).

Thus, utter chaos will follow in Texas in relation to cases involving issues on receiverships, res judicata, final judgment, etc. was shown in Petitioners' Application for Writ of Error, filed in the Texas Supreme Court.

To further compound the problem, the Texas Supreme Court stated in *Mathews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990), that "[i]n any event our denial of the writ is **NO INDICATION** that this court approved the opinion of the court of appeals. *See* Tex. R. App. P. 133(a)." The preceding statement irrefutably demonstrates that the Texas Supreme Court does not want to be associated with the appeals court ruling. However, the importance of the issues of this case makes this attitude irrational. The language used in *Mathews*, 796 S.W.2d at 694, is much stronger than that of Tex. R. App. Proc. 133(a).

The refusal of the Texas Supreme Court to abide by its previous ruling has made a **MOCKERY OF STARE DECISIS** (to

abide by or adhere to decided cases. Black's Law Dictionary, 5th Edition, page 1261).[2]

REASONS FOR GRANTING THE WRIT

1. **Petitioners were denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed. The Texas Election Code Section 251.003 is unconstitutional. The hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constituted a lack of access to the court and an obstruction of justice.**

Campaign contributions are legalized bribery. (Appendix "A, A-2").

The issues of denial of due process and equal protection under the law are included due to Judge Don Wittig, 125th District Court, Judge Murray Cohen, 1st Court of Appeals and the Texas Supreme Court Justices' failure to disqualify themselves due to conflicts are grounds for such a petition on United States constitutional grounds enumerated herein.

The bias and prejudice of Judge Wittig, Judge Cohen and the Texas Supreme Court and lack of access to a meaningful hearing on their complaints violated Petitioners' due process rights under

---

[2]Doctrine of stare decisis imposes a severe burden on the litigant who asks the supreme court to disavow one of its precedents, for that doctrine not only plays an important rule in orderly adjudication, but also serves the broader societal interests in evenhanded consistent and predictable application of legal rules. (Per Mr. Justice Stevens with three Justices joining and three justices concurring in the judgment). *Thomas v. Washington Gas Light Co.*, 100 S. Ct. 2647, 2648, 2658 (1980).

the Fifth and Fourteenth Amendments to the U.S. Constitution for the courts to provide a fair and impartial tribunal.

Petitioners were denied the due process of the laws by the failure of trial court judge Don Wittig to recuse himself due to his bias and prejudice. Texas Court of Appeals Judge Murray Cohen failed to disclose his personal friendship with a party, Harvey Resnick, and disqualify himself or reject assignment when offered. Petitioner is asserting that once the State of Texas provides a process for the judicial review of litigation, which will result in deprivation of property, due process demands that the decision makers be fair and impartial. *Id.* The very notion of "hearing" under the Fourteenth Amendment assumes that the decision maker will listen to arguments of both sides before making decisions. *See Billington v. Undernood*, 613 F.2d 91 (CA 5 Ga. 1980).

Surely our constitutional safeguard against the deprivation of property without due process is violated when a reviewing judge may be allowed to have an interest in one of the parties before him and make no effort to disclose the interest or disqualify himself. Further, the large campaign contributions to the members of the Texas Supreme Court and Judge Wittig and Judge Cohen should have disqualified these judges from this case. How is the fundamental right to a fair and impartial tribunal served by turning our backs to the implication of these facts? There can be no dispute that the state of the facts here leaves a "taste" of impropriety.

Petitioners believe that they have and will show herein that the judges involved in this case have not given the Petitioner their constitutional rights of due process and equal protection of the law as required by the 5th and 14th Amendments to the U.S. Constitution. Petitioners' due process rights have been dismissed by the Texas Supreme Court with two words, "Writ denied." The Texas Chief Supreme Court Judge Phillips adheres to Petitioners' argument as shown in his newspaper article (Appendix "Z") in which, among other things, he demands a change to the method of putting judges on the bench. In an article, "Special interests donate most to justices, study finds," from the *Dallas Morning News*, Wednesday, Sept. 2, 1992, page 5, the Chief Justice of the Texas Supreme Court was quoted as saying: "The way these judicial races

are funded is a problem and certainly a problem of appearance and I agree with that." Tom Smith, director of Public Citizens Texas Office went on to say, "It doesn't take a rocket scientist to figure out what is going on here—and, if campaign contributions don't influence decisions some of the smarter lawyers in the state are wasting lots of money!" Also attorney David Bragg of the Texas Consumer Association stated "If we had the power to indict, we would indict the system. The system is wrong, the system is bad. The Texas Supreme Court judges who took large campaign contributions from Baker & Botts law firm and Texas Commerce Bank should have gone on the record and disqualified themselves from sitting on this case. A reasonable mind would assume that the large campaign contributions have been made to influence the Justices of the Supreme Court, which obstructs justice and denies a whole class of citizens open access to the court.

Any law antagonistic to the Constitution cannot stand and if challenged will be declared invalid. It does not lie within the power of the legislature to enact laws in conflict with the Constitution. This Texas Election Code 251.003 is thus unconstitutional.

Appendices "A," "I," "J," "K" and "Z" clearly demonstrate the unconstitutionality of the Texas Election Code. Even the Chief Justice of the Texas Supreme Court Tom Phillips in his article (Appendix "Z") agrees that unlimited campaign contributions and the way we elect judges in Texas is wrong. As shown in Appendix "I," the only way the law is going to be changed is by action of the federal Court.

It is believed that the Federal Constitution requires that the Texas Supreme Court be ordered to remand this case to the Texas Court of Appeals for reconsideration by a new panel of judges who have no secret agenda in form of any of the parties and/or attorneys to this cause of action. In the alternative, dismiss judgment against the Schwagers as the method of putting judges on the bench in Texas is unconstitutional.

> Over the past few years, there has been a great deal of publicity over judicial campaign finance in Texas. Reformers within Texas and the media have criticized judicial campaign finance and have issued calls for changes in the

> way judges are selected. Former Chief Justice John Hill, for example, has been the leading advocate of merit selection of judges in Texas. He has argued that one reason Texas should adopt merit selection is to reduce the appearance of impropriety associated with large campaign contributions and the solicitation of campaign funds from lawyers who practice in Texas courts.[3] Those concerns have been echoed by the media in articles in major news magazines, newspapers, and in a "60 Minutes" television broadcast. Academic research has also explored Texas judicial finance, primarily as an illustration of a state with serious problems in its system of judicial campaign funding.[4]

Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, Law & Social Change 91, 91 (1992).

One of the most fundamentally protected concepts of due process is the right of a litigant to present his case before a fair and impartial tribunal. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 279, 49 L. Ed. 2d 683 (1976); *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 1778, 29 L. Ed. 2d 83 (1972); *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); *Strong v. Pontiac Gen. Hosp.*, 419 Mich. 872, 347 N.W.2d 696 (1982); *Crampton v. Dep't of State*, 395 Mich. 347, 235 N.W.2d 352 (1975); *Murray v. Milner*, 118 Mich. App. 352, 325 N.W.2d 422 (1982), *rev'd*, 419 Mich. 872, 348 N.W.2d 6; U.S. Const. amends. 5, 14.

---

[3]For example, see generally, Hill, "The Texas Plan: Merit Selection of Judges" in Committee of 100, *The Texas Plan: Merit Selection of Judges* (1986); see also, Jackson & Riddesperger, "Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court", 74 *Judicature* 184 (1991).

[4]Banner, "Disqualifying Elected Judges from Cases Involving Campaign Contributors", 40 *Stanford Law Review* 449 especially at 449-51 (1988); Schotland, "Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy", 2 *Journal of Law and Policy* 57 (1985).

Due process demands *impartiality* on the part of those who function in judicial or quasi-judicial capacities. U.S.C.A. Const. amend. 5; *Schweiker v. McClure*, 102 S. Ct. 1665, 1670 (1982). Due process requires hearing by an *impartial tribunal*. To comport with due process, tribunals should avoid even *appearances of impropriety*. U.S.C.A. Const. amends. 5, 14; *Dirt, Inc. v. Mobile County Com'n*, 739 F.2d 1563, 1566 (1984). Campaign contributions are made with the intent of influencing the judges to whom the contributions are made. This form transcends to an individual or class of case. *Sec. Cox v. State of Louisiana*, 85 S. Ct. 476, 480 (1965). All citizens of the U.S. have the constitutional right of access to the courts. *See Bounde v. Smith*, 97 S. Ct. 1491, 1498 (1977).

2. Petitioner Bette R. Schwager was deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 as she was not allowed to prosecute her claims and defend herself against the taking of her property.

Fundamental requirement of due process is the opportunity to be heard; it is an opportunity which must be granted at a meaningful time in a meaningful manner. *Armstrong v. Manzo*, 85 S. Ct. 1187, 1191 (1965).

The Texas courts have returned to the middle ages on women's rights. The denial of Bette Schwager's constitutional right of due process and equal protection under the law because she is a woman is unconscionable. Due process as required by both the federal and state constitution is the law which hears before it condemns proceeds with inquiry and renders judgment only afterwards. Trial Court Judge Wittig threatened Bette Schwager with being shot when he stated the following: S.F. 1693-1694. "Deputy Buffington has informed me of some remarks coming from participants in trial. Mrs. Schwager I know this is a tremendous emotional strain on you but my bailiff is not liking some of the remarks you're making. I understand it's a lot of pressure but try not to make comments to

him. That upsets him and he has a 357 Magnum." This is an unbelievably callous remark for a trial judge to make, especially considering the circumstances.

BETTE SCHWAGER WAS NOT A PARTY TO THE LAWSUIT

The 87-14551 judgment shows its invalidity on its face as it states that Bette Schwager is a party on page 1 and assesses her damages on page 13. (Appendix "O"). The court did not have jurisdiction over Bette Schwager as it did not allow her to be a party to this lawsuit. Bette Schwager had her own cause of action against TCB and the Limited Partners and had a constitutional right of due process to be heard on her claims. TCB had to sue Bette Schwager to obtain her interest in the community property, as the community property was part of the suit. TCB knew that Bruce Schwager was married at time of loan as shown by Homestead Agreement and they were required to have her sign assignment of note. The Jow note was community property and was under the control of Bette Schwager. Appendix "N."

Bette Schwager was never served by TCB, and their pleadings (Appendix "P") do not show any causes of action against her. When there is no valid service of process against a defendant, the trial court lacks jurisdiction. *Trans-State Pavers, Inc. v. Haynes*, 808 S.W.2d 727, 728, 735 (Tex. App.—Beaumont 1991). Accordingly, the lack of jurisdiction renders the judgment void. A void judgment's nullity cannot be waived. *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App.—Dallas 1989).

Appendix "N."

Judgment of court having no jurisdiction is void. *Estin v. Estin*, 68 S. Ct. 1213, 1218 (1948).

Bette Schwager was not allowed to be a party to the lawsuit by trial judge Don Wittig. (Appendix "E"). Bette Schwager was denied her constitutional right of due process and open courts by refusing to allow her to prosecute her claims and defend herself against the taking of her property. Tex. Const. art. I §§ 13, 19. (U.S. Const. amends. 5, 14). Bette Schwager's claims were breach of good faith, breach of contract, mental anguish, salary, punitive damages and attorney fees. (Appendix "N-1").

Bette Schwager was never served by process by Respondents in this lawsuit or allowed to be a party.[5]

In its simplest formulation, due process requires an opportunity to be heard in a meaningful time and in a meaningful manner. U.S.C.A. Const. amends. 5, 14; *Patterson v. Coughlin*, 761 F.2d 886, *cert. denied*, 106 S. Ct. 879, 474 U.S. 1100, 886 L. Ed. 2d 916. What is incredible about this case is that Bette R. Schwager was denied **ANY** hearing of any kind and that the 1st Court of Appeals did not even address this point of error in their opinion (Appendix "Y"). The Texas Supreme Court ruling is even more incredible as they recognized this problem by not agreeing with the 1st Court of Appeals with the statement, "Writ Denied," but would not remand the case for a new trial.

The essence of Due Process is fundamental fairness. U.S.C.A. Const. amend. 5; *Crest v. Lane*, 745 F.2d 476, *cert. denied*, 105 S. Ct. 2146, 471 U.S. 1068, 85 L. Ed. 2d 503. The fundamental purpose of Due Process Clause is to allow aggrieved party an opportunity to present his case and to have its merits fairly judged. U.S.C.A. Const. 5, 14; *Okison v. Tolley School Dist. No. 25 Renville County State of N.D.*, 760 F.2d 864, *reversed*, 766 F.2d 378. Due Process is the right to a hearing by an impartial tribunal. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). The fundamental requisite of due process of law is the opportunity to be heard and hearing must be at meaningful time and in meaningful manner. U.S.C.A. Const. amend. 14; *Goldberg v. Kelly*, 90 S. Ct. 1011, 1020 (1970). While procedural due process is flexible and variable in different situations, complete absence of ***any*** due process at all cannot be justified under the guise of flexibility. U.S.C.A. Const. amends. 5, 14; *Craig v. Carson*, 449 F. Supp. 385, 390 (1979). The absence of some form of those basic protections or procedural due process is a fatal deficiency. *North Ga. Finishing, Inc. v. Di Cheng, Inc.*, 419 U.S.

---

[5]One is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 89 S. Ct. 1562, 1569 (1969).

at 607, 95 S. Ct. at 722, 42 L. Ed. 2d at 757. The fundamental, indispensable protections of procedural due process are (1) a hearing (2) before an impartial decision maker, after (3) adequate notice of the reason for the deprivation with (4) an opportunity for the individual to present his case. *Mathews v. Eldridge*, 424 U.S. at 333, 96 S. Ct. at 901, 47 L. Ed. 2d at 32.

Some form of hearing is required before owner is finally deprived of a protected property interest. The decisions of this Court have emphasized time and again the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1156 (1982). Court has no power without personal jurisdiction. *Zenith Radio Corp. v. Hazeltine Research*, 89 S. Ct. 1562, 1569 (1969). Judgment entered against Bette Schwager is void for lack of jurisdiction.[6]

3. Petitioners were denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case as the court of appeals struck 43 of Appellants' 44 points of error for procedural defects.

Appendix "M" conclusively demonstrates the invalidity of the order striking points of error (Appendix "V"). The order itself establishes its own invalidity.

An appellant should be accorded a very reasonable and liberal interpretation of the rules and requirements of appellate review. *Salvaggio v. Brazos Cty. Water Control*, 598 S.W.2d 227, 229 (Tex. 1990). The U.S. Supreme Court has stated that the rules of procedure "should be interpreted to prevent the loss of the right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978).

---

[6]Void judgment may be collaterally impeached. *Fay v. Noia*, 83 S. Ct. 822, 841 (1963).

The ruling issued on Feb. 24, 1992 did not take into consideration Appellants' Response Brief filed on Feb. 13, 1992. The complaints raised by TCB in its brief were directly answered by Appellants in their Response Brief. Many of the complaints made about the briefing rule violations of Appellants by the Appeals Court are not valid due to the content of Appellants' response brief. Local Rule 1.74(c) of the First Court of Appeals states that "supplemental briefs may be filed without leave of Court only if no new points of error are raised." Appellants did *not* raise any new points of error in their response (supplemental) brief.

The 1st Court of Appeals should have made the detailed objections which it made Feb. 24, 1992 on either 5/16/91 or 8/8/91. Clearly, Appellants believed that their brief had been approved and that a fair evaluation of their points of error would be forthcoming. The striking of 42 points out of 44 was, in effect, a violation of the spirit and intent of TRAP 83, as well as the Supreme Court ruling in *Inpetco, Inc. v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987).

Certainly a liberal construction of the rules would have precluded the Appeals Court from the action it took in striking 42 of Appellants' 44 points of error. This was in effect striking the entire brief of Petitioners, as Point of Error #1 is a fundamental error point, and #4 was not reviewed for substance.

The Rules of Civil and Appellate Procedure unquestionably show that the rules are to be construed liberally.

TRCP #1: Rules are to be given liberal construction.

TRAP 74(p): Briefing rules are to be construed liberally.

The Supreme Court of Texas has emphasized liberal construction of the briefing rules. *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986); *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988); *Williams v. Khalaf*, 802 S.W.2d 651 (Tex. 1990); *Weaver v. Southwest National Bank*, 813 S.W.2d 481, 482 (Tex. 1991). Form should not be elevated over substance.

TRAP #83 requires that Appellants should have time to correct irregularities in their brief prior to the judgment being affirmed.

There were no specific complaints made about Appellants' brief that were not corrected prior to the Appeals Court's Order (by fax) of Feb. 24, 1992. Contrary to the Appeals Court's statement on page 2 of its Order, Appellants *never* had the opportunity to correct any specific deficiencies that may have existed as set out in the Order of Feb. 24, 1992. A Rule permitting brief to be amended or supplemented at any time is to be liberally construed. *Houston-American Finance Corporation v. Travis*, 343 S.W.2d 323, 326 (C.A. Tex.--Dallas 1960). Supplemental briefs are allowed per TRAP 74(o). The right of appeal is one provided by statute.

The last clause of Tex. R. App. P. 74(o) states:

> "Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, *and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.*" (Emphasis added).

The adequacy of the Schwagers' June 17, 1991 brief turns on several simple questions--whether briefing rules are to be construed liberally, whether an appeals court is required to review at least one S.F. reference to see if rules are complied with, whether response brief adding no new points of error is to be reviewed by an appeals court, whether appellants are entitled to re-brief when specific complaints to brief are made, or whether an appeals court can use the rules offensively to deny right to appeal.

Rule 74(f) states that "repetition or prolixity of statement or argument must be avoided." Rule 74(o) states as follows: "Briefs may be amended or supplemented at any time when justice requires under such reasonable terms as the court may prescribe and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented." The briefing rules are subject to Tex. R. App. P. 74(p) which provides as follows:

> *Briefing Rules to be Construed Liberally.* The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interests in justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

Measured against these standards, the Schwagers' June 17, 1991 brief is not inadequate, especially when Schwagers' Response Brief is included. The Schwagers' brief is certainly not so inadequate as to warrant the severe sanction imposed by the court of appeals. Accordingly, the court of appeals erred in finding a "waiver" of the Schwagers' second, third, and fifth through 44th points of error.

Note: **PETITIONERS' (APPELLANTS') SUPPLEMENTAL BRIEF FILED FEB. 13, 1992 WAS ALSO NEVER REVIEWED BY THE FIRST COURT OF APPEALS.**

The following is a quote from the Texas Bar Journal, December 1987, p. 1207, footnote 47:

> While the due process provision of the United States Supreme Court does not guarantee a litigant a right of appeal, *McKane v. Durston*, 153 U.S. 684 (1894), the open courts provision of the Texas Constitution does. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). In order for this right of appeal to satisfy the requirements of due process, it must afford litigants a fair opportunity to obtain a meaningful appeal on the merits. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Armstrong v. Manzo*, 380 U.S. 545 (1965). *See* Carlson, *Mandatory Supersedeas Bond Requirements: A Denial of Due Process Rights?*, 39 Baylor L. Rev. 29 (1987). An appeal may of course be regulated by procedural requirements. *Logan v. Zimmermann Brush Co.*, 455 U.S. 422 (1981). However, procedural limitations may not irrationally or arbitrarily impede access to the court because the right of appeal that is granted by a state must

> be kept clear of any "unreasoned distinctions." *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969). Adjudged by these standards, an argument could be made that review of some errors but not others which might require reversal, denies an effective appeal in violation of due process rights guaranteed by the Texas Constitution. Tex. Const. art. I, § 13. On the other hand, an equally persuasive argument is that the petitioner has had full appellate review before the court of appeals and duplicative review of all issues is not required.

The preceding unquestionably shows that Petitioners were denied their constitutional right to appeal. **The fact that the First Court of Appeals did not review 43 of Petitioners' 44 points of error made it mandatory for the Texas Supreme Court to remand this case to the appeals court for review of the 43 points stricken for procedural defects or remand to a district court for a new trial.** (Appendices "V" & "Y").

Once a state establishes avenues of appellate review such avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Williams v. Oklahoma City*, 89 S. Ct. 1818, 1819 (1969); *Rinaldi v. Yeager*, 86 S. Ct. 1497, 1500 (1966). Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. *Douglas v. People of State of California*, 83 S. Ct. 814, 815 (1963). Petitioners were entitled to a review of their case on its merits. *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1156 (1982).

4. **Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas. Petitioners were denied the benefit of the final judgment entered in their favor on Oct. 14, 1986. (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Petitioners were denied their**

constitutional rights by the Texas courts assessing judgment against them without jurisdiction.

In *Leis v. Flyn*, 439 U.S. 438, 441, 99 S. Ct. 698, 700 (1979), this Court held that rights "derived from statute or legal rule" under state law are protected by the Fourteenth Amendment.

Petitioners submitted to the Texas Supreme Court an Application for Writ of Error, 5/21/92, a Reply Brief, 8/3/92 and a Motion for Rehearing, 9/24/92. These documents contained seven U.S. Supreme Court cases, 55 Texas Supreme Court cases and one Alaska Supreme Court case in support of their arguments against the action of the Texas 125th District Court and the 1st Court of Appeals. (Appendix "H"). These cases were ignored by the Texas Supreme Court.

The ruling in this case by the First Court of Appeals dramatically changed the existing law pertaining to "Jurisdiction" and "Final Judgments." In a far-reaching opinion (Appendix "Y"), the Court of Appeals determined "sua sponte" that the preceding 85 years of Texas Supreme Court rulings on Final Judgments were invalid. *See Waters-Pierce Oil Co. v. State*, 106 S.W. 326, 329 (Tex. 1907); *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988). The First Court of Appeals (Justice Cohen) stated that the "Final" Judgment entered in Case #86-07376 by the sitting Judge Michael O'Brien of the 125th District Court was not a Final Judgment (Appendix "Y-5").

The Appeals Court assumed jurisdiction of this case which it did not have and committed fundamental error.

Judge O'Brien, trial judge in Case #86-07376, clearly demonstrated the finality of the judgment issued on Oct. 14, 1986 as shown in Appendix "G." The following docket entries were made by Judge O'Brien in Case #86-07376:

7-14-86 - Case Came On For Trial before Court as Set by Court Order All Parties appeared and announced ready for trial. All issues of law and fact were submitted to court.

7-22-86 Testimony concludes court hears closing arguments - matter taken under advisement

10-14-86 Final Judgment Signed

The following statements were made by Judge O'Brien at Hearing on May 26, 1987. Appendix "G."

1. The 1986 lawsuit is over and final
2. The only thing I have any continuing jurisdiction over in aid of my judgment is a receiver

List of documents showing finality of 1986 judgment is found in Appendix "F."

Judgment of court lacking jurisdiction is void. Where court of competent jurisdiction has entered final judgment on merits parties and their privies are bound not only as matter offered and received to sustain or defeat claim or demand but as to any other admissible matter which might have been offered. *Sea-Land Services, Inc. v. Gaudet*, 94 S. Ct. 806, 811 (1974). *Burnham v. Superior Court of California*, 110 S. Ct. 2105, 2109 (1990). Petitioners have complained about the lack of jurisdiction in the District, Appellate and Supreme Court of Texas. Schwagers now make this plea in the Court of Last Resort, the U.S. Supreme Court. The 1st Court of Appeals ruled that the appointment of a receiver to sell the property made the judgment interlocutory. This ruling is incorrect as shown herein. Appendix "R." Appointment of a receiver to enforce judgment does not make judgment interlocutory. 75 CJS 692 § 29. A judgment entered after a conventional trial on the merits is NOT interlocutory.

The Texas Supreme Court's refusal to issue an opinion upholding its previous rulings, as shown herein, is a serious departure from existing law and principles. 1203 Texas Bar Journal Dec. 1987.

Appendix "L" sets out in detail a litany of issues and rulings that were ignored by the courts of Texas, which denied Petitioners Due Process and Equal Protection of the law. These were forgery, conspiracy, good faith, breach of contract, mental anguish, wrongful acceleration, etc. The preceding issues were not submitted to the jury over the strenuous objections of Schwagers.

Due Process is secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the power of government unrestrained by the established principle of primal right. *Leeper v. State of Texas*, S. Ct. Rep. 462-468 (1890). Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. *Douglas v. People of State of California*, 83 S. Ct. 814, 815 (1963). The Equal Protection Clause requires more of the statute than nondiscriminatory application within the class it establishes and also, imposes requirement of some rationality in the nature of class singled out. *Rinaldi v. Yeager*, 86 S. Ct. 1497, 1499 (1966).

"The court may appoint receiver as means of properly enforcing its judgment and in such proceeding validity of original cause of action cannot be questioned to frustrate or obstruct enforcement of judgment. Rev. St. 1925 arts. 1914, 2217, 7391; Const. art. 5 § 8." *Hunt Production Co. v. Burrage*, 104 S.W.2d 84, 87 (C.A. Texas—Dallas 1937). The preceding further shows the manifest injustice perpetuated on Schwagers by the courts of Texas.

Justice Cohen of the First Court of Appeals on March 12, 1992 ruled that the judgment rendered in Case #86-07376 on Oct. 14, 1986 (Appendix "W") was not final. The basis for this ruling was that a receiver was appointed. The authority being Tex. Civ. Prac. & Rem. Code Ann. § 51.014(1) (Vernon Supp. 1992). Appendix "U." This statute does not state that every order appointing a receiver is interlocutory, nor does it even imply it. Justice Cohen did not give **ANY CASE LAW TO SUPPORT HIS POSITION**, as there is none. It was the **OBLIGATION OF THE TEXAS SUPREME COURT** to deliver an **OPINION** either agreeing or disagreeing with his impression.

Petitioners pled that the Limited Partners' claims against Bruce Schwager were barred by **COLLATERAL ESTOPPEL**[7] and **RES**

---

[7]"The Supreme Court and other courts have explained that res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resource and by preventing inconsistent decisions, encourage reliance on adjudication. *Allen, supra*, 449 U.S. at 94, 101 S. Ct. at 414-15" *Drum v. Nasuti*, 648 F. Supp. 888, 898 (E.D. Pa. 1986); *Allen v. McCurry*, 101 S. Ct.

JUDICATA[8] - (Appellants' Point of Error #2). These claims were wrongfully stricken by the 1st Court of Appeals Judge Murray Cohen. Appendix "V-3" and Appendix "M-1."

Even if the judgment in Case #86-07376 was not final as Justice Cohen suggests, **RES JUDICATA WOULD STILL BE APPLICABLE.** Final judgment settles not only issues actually litigated, but also any issues that could have been litigated; that judgment may have been wrong or premised on legal principle subsequently overruled does not affect application of res judicata. *Secrest v. Secrest*, 649 S.W.2d 610, 612 (Tex. 1983). Doctrine of res judicata bans re-litigation of same cause of action between same parties or their successors in interest.[9] All respondents in the action claimed res judicata and collateral estoppel. **(Appendix "P").**

Appointment of a receiver to enforce a final judgment does not affect the finality of the judgment.[10]

5. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court.

The Appeals Court did not correctly state the nature of the case. The First Court of Appeals adopted the false and misleading statements made by TCB in its reply brief (filed July 29, 1991).

411, 414, 415 (1980); *also Asher v. Swenson, Warden*, 397 U.S. 436, 464 (1970).

[8]"There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 101 S. Ct. 2424, 2428 (1981); *Brown v. Felsen*, 99 S. Ct. 2205, 2209 (1979).

[9]*Kremer v. Chemical Const. Corp.*, 102 S. Ct. 1883, 1890 (1982).

[10]District Court that has in personam jurisdiction over defendant may appoint receiver to enforce judgment. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1181, 1187 (11th Cir. 1991); *Fink v. O'Neil*, 106 U.S. 272.

Schwagers dedicated pages 1-9 of their Response Brief (Supplemental filed on Feb. 13, 1992) to point out the incorrect and misleading statements made by TCB in its opening statement of its Reply Brief. Other false and misleading statements were shown by Schwager in specific Response Points of their Brief (Feb. 13, 1992).

Additionally, Appellants set out in their Motion for En Banc Rehearing (Mar. 27, 1992) the incorrect and inconsistent statements made by the First Court of Appeals in their opinion of March 12, 1992, pages 1-5. **(For details of incorrect and inconsistent statements see Appendix "E").**

The refusal of the Supreme Court of Texas to grant to Schwagers the same relief it grants to others in similar circumstances within its jurisdiction denies Petitioners Schwagers the equal protection of the laws in violation of the Fourteenth Amendment contrary to the U.S. Supreme Court decision in *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 359 (1984) and *Truax v. Corrigan*, 257 U.S. 312, 334, 42 S. Ct. 124, 130 (1921).

The Supreme Court of Texas ignored complaints of fraud and perjury made by Petitioners in the 1st Court of Appeals (Appendices "E" & "H"), disregarded the substantive and procedural law of the state and prior controlling decisions of this Court, and dismissed the action. Nevertheless, the court obstinately refused to reconsider an order by the 1st Court of Appeals based on fraud and perjury. It also refused to recognize the district court's failure to prevent the perjured testimony used by Respondent during the trial of Nov. 1989 (Appendix "T"). The Texas Supreme Court denied Petitioners' Writ of Error without addressing either the false statements of the record or any federal constitutional questions raised by the Application for Writ of Error or the Motion for Rehearing. *See Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679, 50 S. Ct. 451, 453 (1930).

The use of false information to support the opinion of the 1st Court of Appeals—Judge Cohen deprived Petitioners of their constitutional right of due process. Appendix "E." The fundamental requirement of due process is the opportunity to be heard: it is an opportunity which must be granted at a meaningful time in a

meaningful manner. Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965).

Professor Anthony D'Amato addressed judicial fraud as diabolically evil in *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardoza Law Review 1313 (1990). He states: "If we take the most elementary interpretation of the last term justice . . . we must acknowledge that justice, in any situation, depends upon a full and fair accounting of the facts of that situation. If, instead of facts, fictions are introduced that are contrary to the facts, then any claimed *just solution* based on such fictions cannot achieve justice in the real world. The proposition is so elementary that it usually goes without saying." Professor D'Amato further states: "We should ask ourselves what kind of judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply law to those fictitious facts."

CONCLUSION

Petitioner Bruce B. Schwager swore to briefs filed in the 1st Court of Appeals and the Texas Supreme Court. It is clear that the truth in this matter is a major point of contention. Someone in this action is committing fraud and perjury and should be punished for same. Ruling against Bruce B. Schwager is inferring that he has committed perjury. Therefore, the Texas Supreme Court should have filed charges against him. This document has been verified. Appendix "Q."

A complete reading of the Texas Bar Journal article, December 1987, pages 1201-1207 would show that the Texas Supreme Court has seriously departed from existing law and principles in all aspects of the case before the Supreme Court of Texas by not reversing the judgment and dismissing the case or in the alternative remanding the case for a new trial. "Schwagers" sought appellate review of a substantial monetary judgment entered against them in error. The court of appeals failed to consider the judgment entered in Case #86-07376 as final. The trial court did not have jurisdiction to consider Cases #86-07376 and #87-14551 and retry Case #86-07376 as a consolidated case. This judgment should have been

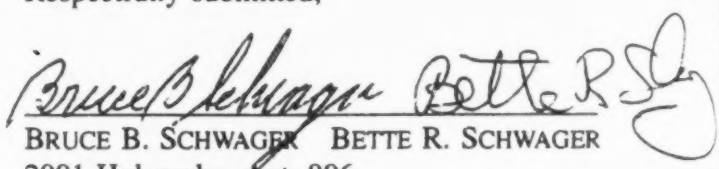
reversed and dismissed by the Texas Supreme Court. There are certain fundamental substantive rights which although not expressly defined in the Constitution or its Amendments have been given status of constitutional rights; examples of such rights are the right to travel, and freedom to choose and pursue a career. A "liberty" right under the Fifth and Fourteenth Amendments means more than freedom from personal restraints, and a "property" right is more than ownership and possession of real and personal property. Const. amends. 5, 14. "Procedural due process" means the procedure used in effecting or denying one's fundamental or constitutional rights. U.S.C.A. Amends. 5, 14. *Haag v. Cuyahogu County*, 619 F. Supp. 262, 275, 276 (D.C. Ohio 1985).

Petitioners suffered an erroneous adverse judgment and the denial of appellate review. Petitioners respectfully request this Honorable Court's intervention so that justice may be done. Meaningful appellate review should not be denied in this case. **THE IMPORTANCE OF THE ISSUES STATED IN PETITIONERS' WRIT OF CERTIORARI AND THE CONSTITUTIONAL PRINCIPLES INVOLVED REQUIRE THAT THIS COURT OVERTURN THE RULING BY THE TEXAS SUPREME COURT WHICH STATED "WRIT DENIED."** Petitioners have been raped by the legal system of Texas. "TCB," through its attorney "Baker & Botts," has gone on unbridled making "false" and misleading statements, in the First Court of Appeals and the Texas Supreme Court and probably this Court to deprive Bruce and Bette Schwager of their rights and property, including an attempt to deprive Bruce Schwager of his freedom. Based on the ruling of the Texas Supreme Court, "Baker & Botts" has been successful using the rule **THAT IF A LIE IS REPEATED ENOUGH TIMES, IT WILL BECOME THE TRUTH.**

Attorneys with Baker & Botts, a defense firm, contributed more money ($197,000) to successful Texas Supreme Court candidates than any other single group of lawyers in the state. (Appendix "X"). It should not go unnoted that the Chief Justice of the Texas Supreme Court Tom Phillips is a former member and/or partner in the Baker & Botts law firm.

It is believed that this Court should dismiss the judgment against Petitioners as they were denied their constitutional rights and the fact that the Texas Election Code Section 251.003 is unconstitutional; in the alternative, it is believed that the Federal Constitution requires that the Texas Supreme Court be ordered to remand this case to the district court for a new trial or remand this case to the Texas 1st Court of Appeals for reconsideration of the appeal on its merits. For these foregoing reasons, it is respectfully requested that this Court grant the Petition for a Writ of Certiorari. Petitioners further pray for other relief in law or in equity for which they may be entitled.

Respectfully submitted,



BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030

Pro Se

92-1265

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030
(713) 796-2540

Pro Se

APPENDIX TABLE OF CONTENTS

		Page
APPENDIX "A":	Newspaper Articles - Campaign Contributions Legalized Bribery	A-1
APPENDIX "B":	Ruling Texas Supreme Court, 9/9/92	B-1
APPENDIX "C":	Ruling Texas Supreme Court, 10/28/92	C-1
APPENDIX "D":	Judgment 1st Court of Appeals, 3/12/92	D-1
APPENDIX "E":	Incorrect and Inconsistent Statements	E-1
APPENDIX "F":	Documents Showing Finality of 86-07376 Judgment	F-1
APPENDIX "G":	S.F. Hearing, 5/26/87	G-1
APPENDIX "H":	List of Authorities Submitted to Texas Supreme Court	H-1
APPENDIX "I":	Newspaper Article: Texas Justice for Sale	I-1
APPENDIX "J":	Newspaper Article: Law Firm Top Donors to Justices	J-1
APPENDIX "K":	Newspaper Article: Selecting Our Judges	K-1
APPENDIX "L":	Answer to Action of Trial Court	L-1
APPENDIX "M":	Answer to 1st Court of Appeals Order 2/24/92	M-1

APPENDIX "N": Bette Schwager's Detailed Argument . . N-1

APPENDIX "O": Judgment Case #87-14551 . . . . . O-1

APPENDIX "P": Respondents' Trial Pleading P-1

APPENDIX "Q": Verification Q-1

APPENDIX "R": Argument for Finality of 86-07376 Judgment R-1

APPENDIX "S": Texas Election Code S-1

APPENDIX "T": Arguments for Conspiracy & Perjury . . T-1

APPENDIX "U": Constitutions and Statutes U-1

APPENDIX "V": Order Striking 42 Points of Error 2/24/92 . . . . . V-1

APPENDIX "W": Judgment Case #86-07396 . . . . . W-1

APPENDIX "X": Campaign Contribution Report X-1

APPENDIX "Y": Opinion Affirming Judgment Cause #87-14551, 3/12/92 . . . . . Y-1

APPENDIX "Z": Newspaper Article: There are better ways to finance judicial races than the way we do in Texas Z-1

APPENDIX A

Article from *Las Vegas Review Journal*, Sunday, November 25, 1990

Nevada's judicial selection process akin to legalized bribery

By Albert G. Marquis
Special to the Review-Journal

Trial attorneys, who spend more time in front of judges than anyone else, are in overwhelming agreement that judges should not be forced to run for election. In the first place, there is no way to compare one candidate's judicial acumen with his opponent's, and it is certainly impossible for the general populace to recognize and comprehend any difference. Of greater importance, this process, which can require the expenditure of two to three times a judge's annual salary, encourages favoritism and can give rise to the perception of corruption.

Every time we go through a judicial election, candidates struggle to compare themselves with their opponents and at the same time stay within the bounds of decency and judicial ethics. It is not uncommon for judicial opponents to argue about who is tougher on crime—and to bellow about the incumbent's reversal rate or debate who is more ethical.

During the recent election, Jeff Sobel cited Nevada Supreme Court opinions that were critical of Judge John Mendoza, leading Mendoza to respond that Sobel had violated judicial ethics by commenting on a pending case. Sobel's counterattack included a threat to sue Mendoza for slander.

During the same campaign period, Reno attorney Ralph Crow was suing the state bar, the attorney general, the secretary of state and the Supreme Court because he was not allowed to run against Supreme Court Justice Tom Steffen. Meanwhile, judicial candidate Milos Terzich was accusing a Supreme Court justice of unethical

conduct for endorsing Terzich's opponent, Judge Norm Robison. Obviously, even judicial candidates and their supporters find it difficult to compare qualifications.

From this morass of mud-slinging, do we really expect the public to be able to select the best person for the job? In fact, do any of the accusations cited above actually reflect on a person's ability to be a good judge? All of this might be meaningful only if we want to select a judge on the basis of who is able to make the most scurrilous accusations against his opponent. In reality, however, this bickering means more to the opponents than to the electorate. In the final analysis, the winner will be the person who has his face on the most billboards and who appears most frequently on television with his family. To win, therefore, it takes bucks—big bucks.

Where does a judicial candidate accumulate such a war chest? He solicits campaign contributions just like any other political candidate. Almost all judges and attorneys who run for judicial posts abhor the fact that they must "hit up" other attorneys and businesses for contributions, but under our system they have no choice.

Suppose a local corporation makes a $10,000 contribution to an individual who is then elected judge. That money was vitally important in winning the election, and it will be vitally important again at re-election time. In the meantime, you happen to become involved in a lawsuit with that company, and your case is assigned to that judge. Aren't we asking too much of any individual to remain fair and impartial in the face of that reality?

As a matter of fact, there is nothing to prevent that corporation (or anyone else) from making a campaign contribution to the judge right before the trial is to begin. Of course, it is illegal to give the judge a $10,000 "bribe," but it is perfectly permissible to call this payment a "campaign contribution." What we have, then, is nothing but a legalized system of bribery.

This is not to indict any of our judges. Most of them try their best to be fair. But the reality is that we are subjecting our judges to temptation. Moreover, we are giving corrupt citizens an avenue by which they can attempt to influence judges with money.

Beyond that, the prospect of being forced to run for election, along with the necessity of raising money, is so distasteful to many individuals that some of our most qualified attorneys shy away from judicial office. Combine this with the fact that judges are grossly underpaid, and it is indeed miraculous that we have as many fair, qualified judges as we do.

There are better systems. In Sweden, for example, the attorneys are required to select from their ranks those individuals who they think will make the best judges. Those attorneys are in essence drafted for six-year terms. At the end of that term, new judges are selected. The other attorneys know who is knowledgeable and fair, and there is, consequently, little chance of an unqualified or biased person becoming a judge. There are no slurs, ethical violations, lawsuits or questionable campaign contributions.

Another method for selecting judges is the Missouri plan. It provides that judicial candidates are interviewed by a screening panel, which then submits three names to the governor, who appoints one of them. This is the system we now use to fill mid-term vacancies, and it has worked well. Under the Missouri plan, a judge then runs against his own record, and the people decide whether to retain him. This plan has been heralded across the country as far superior to the general election process.

A couple of years ago, the Legislature put on the ballot Question 4, which would have scrapped our system in favor of the Missouri plan. As election day approached, it appeared that Question 4 would pass. A few days before we went to the polls, however, the R-J changed its position and announced its opposition to Question 4. The stated basis for this change of heart was the cliche that "the election process is a power that should not be taken away from the people." With that bit of drivel, Question 4 failed

by a few thousand votes, and we have since been forced to endure more judicial campaigns.

In spite of this setback and the slight opposition that exists among well-meaning but misguided individuals, the Nevada Legislature should not give up. Our judicial selection process is in dire need of reform, and it should be a priority when the Legislature convenes in January.

Marquis is a Las Vegas attorney.

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 9, 1992

Mr. T. Ransom Cornish
3131 Eastside, Suite 330
Houston, TX 77098

Ms. Cynthia G. Farris
Baker & Botts
One Shell Plaza, 910 Louisiana
Houston, TX 77002-4995

Mr. Robert Axelrad
1990 Post Oak Boulevard
14th Floor
Houston, TX 77056-3814

Mr. Neil S. Levin
Suite 710
4828 Loop Central Drive
Houston, TX 77081-2212

Mr. Newton B. Schwartz
Schwartz, Berger &
Valdez, P.C.
723 Main Street
Suite 325
Houston, TX 77002

Mr. Joseph D. Cheavens
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Mr. John Zavitsanos
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

RE: Case No. D-2528
Style: BRUCE B. SCHWAGER ET AL.
v. TEXAS COMMERCE BANK, N.A. ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied." Petitioner's motion for Supreme Court not to consider reply brief is overruled.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 28, 1992

Mr. T. Ransom Cornish
3131 Eastside, Suite 330
Houston, TX 77098

Mt. Bruce B. Schwager
2001 Holcombe
#806
Houston, TX 77030

Ms. Cynthia G. Farris
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Mr. Robert Axelrad
Webb Zimmerman Beck Flaum
& Axelrad, P.C.
1990 Post Oak Boulevard
14th Floor
Houston, TX 77056-3814

Mr. Neil S. Levin
4828 Loop Central Drive
Suite 710
Houston, TX 77081-2212

Mr. Newton B. Schwartz
Schwartz, Berger &
Valdez, P.C.
723 Main Street
Suite 325
Houston, TX 77002

Mr. Joseph D. Cheavens
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Mr. John Zavitsanos
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

RE: Case No. D-2528

Style: BRUCE B. SCHWAGER ET AL.
v. TEXAS COMMERCE BANK, N.A. ET AL.

Dear Counsel:

Today, the Supreme Court overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, CLERK

BY: _____
Tencha Damian, Deputy

APPENDIX D

Court of Appeals
First District of Texas

COPY OF JUDGMENT

BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.B.M., LTD, AND B.M. BAYOU CORPORATION, APPELLANTS

NO. 01-90-00270-CV V.

TEXAS COMMERCE BANK N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE, HARVEY RESNICK AND WILLIAM CRAMER, APPELLEES

Appeal from the 125th District Court of Harris County (Tr. Ct. No. 87-14551).
Opinion delivered by Justices Cohen, Justices Bass and Wilson also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on December 8, 1989. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, **BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.M.M., LTD., AND B.M. BAYOU CORPORATION**, and their surety, **LAWYERS**

SURETY CORPORATION, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Bass, Cohen, and Wilson.

Judgment entered 3-12-92

APPENDIX E

INCORRECT AND INCONSISTENT STATEMENTS OF APPEALS COURT IN OPINION (MARCH 12, 1992)

Note: Many of the following statements have been previously set out in Appellants' Motion for Sanctions and Gag Order (Date Aug. 22, 1991) and their Response Brief filed on Feb. 12, 1992. This is now the third time that Appellants have complained about these incorrect statements. It is especially noted that Mr. Schwager *verified* the preceding two documents.

This Court order does not state which documents were reviewed as a basis for its opinion. Thus, it is presumed that the Court did review the Appellants' Opening Brief for substance, Appellants' Response Brief, Appellants' various motions, the transcript and statement of fact references made by Appellants.

However, it is apparent that the Court adopted Appellee TCB's Reply Brief in its entirety without a verification of the facts of this case.

Appellants dedicated pages 1-9 in their Response Brief (filed Feb. 13, 1992) just to point out the incorrect and misleading statements made by TCB in its opening statement of its Reply Brief. Other untrue statements are also shown under the specific response points.

The following is a showing of some of the incorrect and inconsistent statements made in this Court Order denying Appellants' appeal dated March 12, 1992.

1. Bette Schwager and B.M. Bayou Corp. were not allowed to be parties to the 1987 lawsuit by Judge Wittig. Judge Wittig stated that Bette Schwager was not a party. (S.F. 828). This deprived Bette Schwager of her property and her constitutional right to

due process. Bette Schwager was never served process by TCB, and she had her own causes of action.

2. B.B.M.M., Ltd. *did not* buy the downtown Houston property to operate a restaurant. It was bought to sell the property for a profit. *See* Partnership Agreement (Trial Exhibit Pl. 56).
3. Schwager also pledged a $25,000 C.D. for the InterFirst loan.
4. The Jow note was not payable to Schwager, but to Space City Sizzler Corp.
5. The Partnership leased the property to B.M. Bayou Corp. to operate a restaurant. Contradictory statement that Partnership bought property to operate a restaurant. What this does show is that B.B.M.M., Ltd. and B.M. Bayou were part of the same entity.
6. The ownership of B.M. Bayou and B.B.M.M., Ltd were the same. The only thing that was different was the tax write-off distribution as shown in the Partnership Agreement 99%-1% in favor of the Limited Partners in the Partnership and 50%-50% in the Corporation. (Pl. Trial Exh. 50).
   Note: Ownership was 50%-50% in both the Corporation and Partnership. Schwager 50, Limiteds 50. Whether the money was in Corporation or Partnership was irrelevant as Limiteds would be entitled to the same distribution.
7. The Limiteds did not pay off the InterFirst loan. This was paid from the TCB $825,000 loan.
8. Relationship between Schwager and Limiteds did not become strained until W. Cramer tried to defraud all Limited Partners and General Partner. (Appellants' Point of Error #16, p. 26 and Response Point #13, p. 33).
9. The partnership did not borrow $825,000 from TCB in Sept. of 1984. It was December of 1984.
10. Schwager and the Limiteds did not sign the Note with TCB. Schwager signed the promissory note as General Partner of the Partnership. The Limiteds *did not sign* the promissory note either as individuals or Limited Partner of the Partnership. Schwager and the Limiteds signed separate personal guaranty agreements.
11. Schwager never endorsed the Jow note to TCB. A review of the note would show this. (S.F. Contempt Hearing August 25, 1988).

12. TCB *did not* believe the restaurant income would cover the note. Neither the letters of intent nor the loan origination document shows this. (Trial Exh. TCB 55B, 55C, 55D, 55F). On the contrary, the restaurant is not mentioned at all in the Letter of Intent. Source of repayment was the *Partners' income.*
13. $125,000 was not used for operating capital. Plus, this statement does not state whether the operating capital was for the Partnership or the Corporation, clearly showing it was the same transaction and the amendment to the lease claim made by TCB and the Limiteds was a fraud on the trial court and now on the Appeals Court.
14. The working capital was not exhausted due to the restaurant continuing to lose money. Also, the $125,000 was not working capital for the restaurant. (Restaurant was owned by Limiteds as well as Schwagers, 50-50). The real unfairness of the 1987 trial and this appeal is probably best shown by the false and misleading statements made about the $125,000.
    Note: The restaurant was closed in December of 1984 prior to the TCB loan being funded. The restaurant did not open until April of 1985. The $125,000 was used to pay the bank loan payment of $11,000/mo. for January, February, and March of 1985 (approx. $33,000). Taxes on the property for 1985, attorney fees for the Partnership, repair of the parking lot, repair and remodeling of the Partnership building, 110-112 Travis Street, points for loan origination, etc. (Borrow statement Pl. trial exhibit 5).
15. The Limited Partners had to make payment to the Partnership so that the Partnership could pay on the loan, not to TCB. The Limiteds did not stop making payments on the TCB loan until Jan. 1987. No charges of wrongdoing were made against Schwager when the Limiteds stopped making payments. (S.F. March 9 Hearing Pursuant to Request of Receiver, pp. 2, 3).
16. Schwager did not sue the Limited Partners for failing to make capital contribution to cover the *restaurant debts.* Schwager sued for capital contribution for the preservation of the *Partnership property and assets.* (Tr. 128, ¶ 7; Tr. 131, ¶ 1).
17. The Limited Partners *did not* counterclaim alleging misconduct by Schwager in *operating the restaurant.* (Tr. 64-76).

18. The Limiteds did not seek damages for breach of fiduciary duty, return of capital contributions as shown in their pleadings. (Tr. 64-76) (Tr. 1-8). As shown in Tr. references, the Limiteds complained of wrongs done by Schwager which included breach of fiduciary duty and breach of contract. The requested dissolution was based on the alleged wrongdoings by Schwager. Further action was requested by Limiteds after the dissolution. (Tr. 75-76). As there was no grounds for dissolution, there was no wrongdoing by Schwager. The Partnership was not dissolved; thus, the Partnership Agreement was still the controlling document.
19. The 1986 suit *was not* tried on July 14, 1986. The 1986 trial began on July 14, 1986 and concluded on July 23, 1986. This was a full trial on the merits which did not last one day as suggested by this Court as previously noted.
20. The trial court signed a "final" judgment on Oct. 14, 1986 as indicated by its docket entry. (Tr. 1347).
21. The receiver was only appointed to sell the property (real estate agent). Receiver had no control over the operation of B.B.M.M., Ltd. or B.M. Bayou Corp. This has previously been previously shown in this document. The intent of the Partnership was to buy and sell the Property.
22. The Limiteds were ordered to pay a total contribution of $14,000/mo. (S.F. Mar. 9, 1987 Hearing Pursuant to Request of Receiver, p. 3).
23. The 1986 Judgment also provided that the trial court would consider requests from any parties to make agreements with third parties that would eliminate the need for a receivership and the sale of the Property. The preceding is not what the Judgment said.

    The actual quote is different from the above and has a far different meaning:

    "14. It is further ordered that the court will consider requests of the *Plaintiffs and Defendants to enter into any* agreements with third parties which would *obviate* the need for *continuation of the* receivership or *the ultimate forced* sale *of the property* of *B.B.M.M., Ltd.* (difference is emphasized) (Tr. 139).

Note: Paragraph 14 of the Final Judgment was to allow the Plaintiff and Defendant, if they agreed between themselves, to deal with third parties.

24. Statement made by this Court that judgment did not adjudicate the Limited Partners' claims alleging breach of fiduciary duty by Schwager and requesting return of capital contributions is not true. Limiteds did not ask for return of the capital contributions. (Tr. 64-76; Tr. 1-8). Breach of Fiduciary duty was thoroughly litigated as previously shown and as this was one of the bases for dissolution of the partnership, it was also ruled on and denied.
25. In late 1986, some of the Limited Partners approached TCB seeking to refinance the loan. This statement shows the conspiracy between TCB and the Bank as this was done secretly and which they did not have right to do as they did not sign the promissory note. (Pl. Trial Exhibit #3). This also would change the Partnership Agreement.
26. TCB approved the refinancing without Schwager knowing about it or having any input to it. (Def. Trial Exh. 48, 49, 50). Schwager did not find out about negotiation between the Limiteds and TCB until Jan. 21, 1989 almost four months after negotiations began. (S.F. 493).
27. Schwager refused the Jan. 21 refinancing because it was an attempt to obtain control of the Jow Note and also because he would have to sign release of claims. Such document released the bank of any wrongdoing. (Def. Trial Exh. 44).
28. The Limiteds again stopped paying the TCB loan (untrue). The Limiteds always paid the TCB loan until Jan. of 1987.
29. The Limiteds approached TCB for a new way to obtain the Jow Note from Schwager, not a new refinancing proposal. (Pl. Trial Exh. 75).
30. That TCB subsequently accelerated the loan is a true statement, except it leaves out the wrongful acceleration and breach of the Promissory Note. Note required ten-day cure period prior to acceleration. TCB breached contract by not giving same. (Pl. Trial Exh. 3, pp. 3, 4).
31. Schwager was not sued for conversion of rental in 1987. (Tr. 208) (Point of Error #44).

32. The Limited Partners were not sued on the Note as stated by this Court. The Limiteds did not sign the Note and were only sued on their personal guarantees.
33. Schwagers sued TCB and the Limiteds by requesting and receiving a TRO on Mar. 27, 1987, three days before TCB sued Schwager on Mar. 30. That is why Schwager should have been Plaintiff in suit, as previously shown in paragraph III.
34. The trial judge directed a verdict for TCB as Plaintiff on Schwager's claims for wrongful acceleration and breach of contract. This was done based on Schwager's allegedly having actual notice that the Note was not being paid. This was in clear violation of the Supreme Court of Texas Ruling in *Ogden v. Gibraltar*, 640 S.W.2d 232, 234 (Tex. 1982), which showed that notice of intent to accelerate was required even though borrower knew the loan was in default.
35. The trial judge submitted no jury question on any claims by Bette Schwager and B.M. Bayou Corp. This statement is conclusive proof that Bette Schwager was denied her constitutional right of due process on her claims and that her property was taken from her. Judge Wittig would not let Bette Schwager be a party to the lawsuit. (Appellants' Response Brief, pp. 14, 15, 16, filed Feb. 12, 1992).
36. In the last paragraph on page 4 of this opinion, the Court states in detail the ruling of the jury in Case #87-14551, while leaving out the facts relating to the questions that the trial court refused to submit to the jury such as the conspiracy issue, forgery issue, wrongful acceleration issue, usury issue, good-faith issue, breach of contract issue, Bette Schwager issues, and mental anguish and pain and suffering issue. The result of this refusal was a comment on the weight of the evidence by Judge Wittig. The jury could only conclude that Schwager was lying about these claims he made during trial. (Points of Error #7 and #42) (Tr. 1191-1212).
37. The Court further leaves out the fact that all of the charges against Schwager were answered in the 42 points of error that were stricken by this Court without being reviewed for substance, only form. *Davis v. City of San Antonio*, 752 S.W.2d 518, 523 (Tex. 1988).

38. Had the Court reviewed Appellants' points of error for substance, all the charges against Schwager would have been reversed. An example of this is the fraudulent inducement charge. Not only do the facts not support this charge, but as a matter of law, this issue should never have been submitted to the jury. (Appellants' Points of Error #38 and #43 and Appellants' Response Point #26 and Response to Limiteds' Brief, p. 59).
39. Under the preliminary procedure matter on appeal section, this Court stated the fact that supported Appellants' submission on the 99-page brief. This Court leaves out an extremely important event in the chronology of events. This Court approved a motion for an extension of time to file a brief in excess of 78 pages and then cut off Appellants legs by denying the actual submission of the brief in excess of 78 pages. A detailed answer to the events stated by this Court is made in referenced Motion to Reconsider Striking of Appellants' 42 Points of Error dated Mar. 8, 1992.
40. The Court in order to support its striking of the 42 points of error has raised some interesting questions:
    a. Why did not the Court on August 8, 1991 strike the Appellants' Brief or order a re-briefing if in fact the Brief was not adequate as the Limiteds stated in their Motion to Strike Appellants' Brief?
    b. Why did the Court wait until Feb. 24 at 3:00 p.m. to fax Appellants the order striking 42 of Appellants' 44 points of error? The appeal was submitted at approximately 9:30 p.m. on Feb. 26, 1992.
    c. Why did the Court deny Appellees Limited Partners' Motion to Strike Appellants' Brief?
    d. Why did this Court not mention that Appellants filed a Response Brief (Supplement) to TCB's Reply Brief on Feb. 12, 1992, twelve days before this Court struck 42 of Appellants' points of error?
    e. Why did this Court not rule on Appellants' Motion to Reconsider Striking of the 42 Points of Error filed on March 8, 1992 prior to making its ruling on the entire appeal on March 12, 1992?

41. According to the bases for the ruling on Appellants' 42 points of error, Points of Error #1 and #4 should also have been stricken. This, however, would not have been allowed. "We concluded that the Court of Appeals should not have affirmed based on Inpetco's briefing inadequacies without first ordering Inpetco to rebrief." *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988).
42. Appellants were never given the opportunity to re-brief based on the specific objections made by the Appeals Court as ruled on Feb. 24, 1992. This assumes that Appellants' Supplemental Brief was not reviewed. Appellants requested this opportunity but did not receive a ruling on same. Appellants should have been given time to re-brief after being given notice of the specific defects or irregularities. *Stevens v. Stevens*, 809 S.W.2d 512, 513, 514 (Tex. App.—Houston [14th Dist.] 1991). Appellants requested that TCB give specific objections to its brief in its Motion for Reconsideration of Order Requiring Appellants to Re-Brief and Order Striking Appellants' Brief (Filed May 20, 1991, p. 2).
43. Schwager filed a Motion to Reverse Judgment and Dismiss the Case on Sept. 12, 1992. Schwager then filed another motion due to the Court's not ruling on the first motion.
44. On 11/21/91, the Court denied Schwager's Motion to Reverse the Judgment and Dismiss the Case.
45. Schwager submitted a Motion to Reconsider on 12/5/91.
46. On 1/30/92, 20 days before submission, the Court strangely reactivated the Motion to Reverse Judgment and Dismiss Case and carried it with the appeal.
47. Schwager states very succinctly in his Motion to Reverse the Judgment and Dismiss (Sept. 12, 1991) Appellants' position on the jurisdiction of the trial court and Court of Appeals. Also, in his second motion and his motion to reconsider, Appellants do not believe that this Court has presented Appellants' position adequately as set out in the Order of March 12, 1992 affirming the trial court opinion.
48. The Court leaves out the fact that Judge Wittig violated the local rules of the Court when he consolidated the older case into the newer case. Motion for Sanctions and Gag Order Exh. "G" 8/22/91. The Rules called for Case #87-14551 to be

consolidated into 86-07376. *Sante Fe Drilling v. O'Neil*, 774 S.W.2d 423, 424 (Tex. App.—Houston [14th Dist.] 1989).

APPENDIX F

LIST OF DOCUMENTS SHOWING FINALITY OF 1986 JUDGMENT

1. 7/14/86 - 7/23/86 Docket Entry - All issues of law and fact were submitted to the court. (Pages A2-3, A2-4)
2. 8/8/86 - Rendition of Judgment - Non-jury trial on merits of case. (Pages A2-5, A2-6)
3. 8/11/86 - Docket Entry - Denied dissolution of Partnership. (Page A2-4)
4. 8/26/86 - Letter - Limiteds' Attorney - Final judgment that will include receiver. (Pages A2-7, A2-8)
5. 10/14/86 Docket Entry - Final judgment signed. (Page A2-4)
6. 10/14/86 - Judgment - No issues left unresolved. (Pages A2-9 through A2-14)
7. 3/9/87 - Hearing - Transcript - Limiteds walked away - financial reasons - no claim made against Schwager for wrongdoing. (Pages A2-15 through A2-18)
8. 5/26/87 - Hearing Transcript - lawsuit is over and final, lost jurisdiction in '86 case, only thing I have jurisdiction over is Receiver in aid of judgment, can't bring up a whole new thing. (Pages A2-19 through A2-21)
9. 7/27/89 - Order - clarifies '86-'87 case relationship. (Page A2-22)
10. 3/4/88 - Order - Execution of judgment in '86 Case - used '86 case # on Executive Order. (Pages A2-23, A2-24)
11. 10/25/84 - Motion in Limine - Judge Wittig states that he was not going to try claims between Limiteds and Schwagers. (Pages A2-25, A2-26)
12. 7/16/91 - Motion TCB - "The Appellees incidentally obtained a judgment against the other Appellees in a related case." (86-07376) (Page A-27)
13. 7/29/91 TCB Reply Brief (p. 12): "Even if a final judgment had been entered . . . ." (Page A-28)

Additional Documents

14. Homestead Agreement. (Referenced at p. 14 of this document) (Pages A2-29, A2-30)
15. Findings and Recommendations. (Referenced at p. 14 of this document) (Pages A2-31, A2-32)
16. Pages 1 and 13 of Modified Final Judgment. (Referenced at p. 14 of this document) (Pages A2-33, A2-34).
17. Pleading Case #86-07376 (Tr. 74) (Referenced at 3 of this document) (Page A2-35)

Note: The preceding documents are listed in Motion to Reverse Judgment and Dismiss Case. This motion was ordered to be carried with the appeal by the First Court of Appeals 1/30/92.

APPENDIX G

Statement of Facts Hearing, May 26, 1987

before --

MR. AXELRAD: Judge, this lawsuit's been pending since 1986, and the bank has been brought into it only after the bank filed suit in February of '87.

THE COURT: No, your suit was filed in 1987 on the note.

MR. AXELRAD: Right.

THE COURT: He has filed-- although he filed it under the 86 number as an amended petition, that's not correct.

MR. AXELRAD: But the bank has never been a party to that action in 86.

THE COURT: What you have done -- and that's why this file got all screwed up, and they came down to see me last week. What you have is a counterclaim against him in the 1987 lawsuit. The 1986 lawsuit is over and final. Okay?

MR. JOSEPH COHEN: Could we have these parties instructed to replead in the 87 cause number? That goes right to the issue. We've tried this case 99.9 percent once, and it's not fair to you or the parties to try this case again.

THE COURT: You have a counterclaim in his 1987 lawsuit, and it's all going to bear that 87 number henceforth.

MR. AXELRAD: Okay.

THE COURT: It is not an amended petition against his clients to which they were never a party in a lawsuit that I'm sure I've lost jurisdiction that was entered in, God knows-- October of '86.

MR. JOSEPH COHEN: October of last year.

THE COURT: The only thing I have any continuing jurisdiction over in aid of my judgment is a

Receiver, but that doesn't mean everybody can turn around and sue everybody and bring up a whole new thing that doesn't have anything to do with the Receiver.

MR. RONALD COHEN: If the Court please, my name is Ron Cohen, and I'm appearing for Steve Smith who was just served and has an answer date next Monday, June 1st.

THE COURT: Right.

MR. RONALD COHEN: He's been added as a brand new Defendant, two and a half million dollars. We'll do everything we can to expedite everything we need to do to go to trial on the merits.

You mentioned September. I just want to make a record now so that I can be heard the first time on this case that I will be in New Mexico during the week of September 14th and couldn't try

APPENDIX H

LIST OF AUTHORITIES SUBMITTED IN TEXAS SUPREME COURT

APPLICATION FOR WRIT OF ERROR

FEDERAL CASES

Page

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 25

TEXAS SUPREME COURT CASES

Alan Sales & Serv. Center, Inc. v. Ryan, 525 S.W.2d 863 (Sup.Ct. of Tex., 1975) 41

B & M Machine Co. v. Arionic Enterprises, 566 S.W.2d 901 (Tex. 1978) 10

Benson v. Wanda Petroleum, 468 S.W.2d 361 (Tex. 1971) 34, A3-4

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984) A3-4

Brown v. Goldstein, 685 S.W.2d 640 (Tex. 1985) 40, 44

Cecil v. Smith, 804 S.W.2d 509 (Tex. 1991) 39, A3-9

Citizens State Bank v. Caney Investments, 746 S.W.2d 477 (Tex. 1988) 2, 8, 9, 12, 19

Collova v. Navarro, 574 S.W.2d 65 (Tex. 1978) 44

Comet Aluminum Co. v. Dichell, 450 S.W.2d 56 (Tex. 1970) 38

Davis v. City of San Antonio, 752 S.W.2d 518 (Tex. 1988) 29, 32, 33, 34

Davis v. McCray Refrigeration Sales Corp., 150 S.W.2d 377 (Tex. 1941) 38

Dunn v. Dunn, 439 S.W.2d 831 (Tex. 1969) 8

Ferguson v. Ferguson, 16 Tex. 184, 338 S.W.2d 945 (Tex. 1960) 7, 16

First Alief Bank v. White, 682 S.W.2d 251 (Tex. 1984) 12

First Nat'l Bank of Dallas v. Brown, 53 S.W.2d 604 (Tex. 1932) 8

Ex Parte Godeke, 355 S.W.2d 701 (Tex. 1962) 39

Hargrove v. Insurance Inv. Corp., 176 S.W.2d 744 (Tex. 1944) 7, 8

Houston Health Clubs v. First Court of Appeals, 722 S.W.2d 692 (Tex. 1986) 10

Hunt v. Wichita County Water Improvement District No. 2, 211 S.W.2d 743 (Tex. 1948) 30

Inpetco, Inc. v. Texas American Bank/Houston, 729 S.W.2d 300 (Tex. 1987) 2, 31

Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983) 11, 12

Lopez v. Foremost Paving Co., 709 S.W.2d 643 (Tex. 1986) 24

McCormick v. Guillot, 597 S.W.2d 345 (Tex. 1980) 12

North East Indep. School Dist. v. Aldrige, 400 S.W.2d 893 (Tex. 1966) 7

Ogden v. Gibraltar Sav. Ass'n, 640 S.W.2d 232 (Sup. Ct. of Tex., 1982) 41

Pace Corp. v. Jackson, 284 S.W.2d 340 (Sup. Ct. of Tex., 1955) 21

Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986) 29

Salvaggio v. Brazos Cty. Water Control, 598 S.W.2d 227 (Tex. 1990) 25

Schwartz v. Jefferson, 520 S.W.2d 881 (Tex. 1975) 8

Shumway v. Horizon Credit Corporation, 801 S.W.2d 890 (Tex. 1991) 41

Thurshy v. Stovall, 647 S.W.2d 953 (Tex. 1983) 12

Touck v. McFall, 661 S.W.2d 923 (Tex. 1983) 11

Trenholm v. Ratcliff, 646 S.W.2d 927 (Tex. 1983) 31

Waters-Pierce Oil Co. v. State, 106 S.W. 326 (Tex. 1907) 2, 8

Weaver v. Southwest Bank, 813 S.W.2d 481 (Tex. 1991) 2, 9

Williams v. Khalaf, 802 S.W.2d 651 (Tex. 1990) 29

Wyatt v. Shaw Plumbing Co., 736 S.W.2d 763 (Tex. App.--Corpus Christi 1987) *rev'd on other grounds* 760 S.W.2d 245 (Tex. 1988) 31

ALASKA SUPREME COURT

Alaska State Bank v. Fairco, 674 P.2d 288 (Alaska, 1983) 41

REPLY BRIEF

Page

FEDERAL CASES

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 15

TEXAS SUPREME COURT CASES

Benson v. Wanda Petroleum Co., 468 S.W.2d 361 (Tex. 1971) 18

Buffalo v. Robbins, 811 S.W.2d 541 (Tex. 1991) 13

Carlton v. Estate of Estes, 664 S.W.2d 322 (Tex. 1983) 19

Citizens State Bank v. Caney Investments, 746 S.W.2d 477 (Tex. 1988) 8

City of San Antonio v. Rodriguez, 35 Tex. Sup. Ct. J. 536, 537 (February 26, 1992) 16

Collara v. Navarro, 574 S.W.2d 65 (Tex. 1978) 23

Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200 (Tex. 1974) 19

Crown Life Ins. Co. v. Estate of Gonzales, 820 S.W.2d 121 (Tex. 1991) 16

Dunn v. Dunn, 439 S.W.2d 830 (Tex. 1969) 20

Ferguson v. Ferguson, 338 S.W.2d 945 (Tex. 1990) 3

Gani v. Gani, 495 S.W.2d 576 (Tex. 1973) 9

Grand Prairie Sch. D. v. Southern Parts, 813 S.W.2d 499 (Tex. 1991) 16

Inpetco v. Texas American Bank/Houston N.A., 729 S.W.2d 300 (Tex. 1987) 3

McGhee v. Eply, 661 S.W.2d 924 (Tex. 1983) 10

Mueller v. Sararia, 35 Tex. Sup. Ct. J. 589, 589-90 (March 25, 1992) 16

Ogden v. Gibraltar Sav. Ass'n, 643 S.W.2d 232 (Tex. 1982) 22

Salvaggio v. Brazos Cty. Water Control, 598 S.W.2d 227 (Tex. 1990) 19

Schwartz v. Jefferson, 520 S.W.2d 881 (Tex. 1975) 10

White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 811 S.W.2d 541 (Tex. 1991) 13

MOTION FOR REHEARING

FEDERAL CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 2, 14

Barber v. Conolly, 5 S. Ct. (1885) 7

Eritts v. Lucey, 469 U.S. 387 (1985) 2, 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) 14

McKane v. Durston, 153 U.S. 684 (1894) 14

Williams v. Oklahoma City, 395 U.S. 458 (1969) 14

TEXAS SUPREME COURT CASES

Abbott Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971) 9

Brown v. Goldstein, 685 S.W.2d 640 (Tex. 1985) 16

Citizens State Bank v. Caney Investments, 746 S.W.2d 477 (Tex. 1988) 7

Davenport v. Garcia (D-1558) 6-17-92 Tx S Ct. 4

Ferguson v. Ferguson, 338 S.W.2d 945 (Tex. 1960) 6

Gentry v. Credit Plan Corporation of Houston, 528 S.W.2d 571 (Tex. 1975) 6

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986) 2, 14

Matthews Const. Co., Inc. v. Rosen, 796 S.W.2d 692 (Tex. 1990) 7, 10

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) 2, 14

Secrest v. Secrest, 649 S.W.2d 610 (Tex. 1983) 12

Transamerica Natural Gas v. Powell, 811 S.W.2d 913 (Tex. 1991) 5

APPENDIX I

Houston Chronicle
Sunday, Sept. 13, 1992

Texas justice for sale? Judge it yourself.

By Clay Robison

Austin — The business, medical and insurance communities screamed bloody murder in the 1980s when trial lawyers shelled out millions of dollars in campaign contributions to pro-plaintiff candidates and purchased a Texas Supreme Court that seldom saw a damage suit it didn't like.

"Outrageous" was one of the milder terms sputtered by the old-line establishment after it realized that it had been outmaneuvered by a bunch of brash, greedy, political upstarts.

Gone were the days when the major, defense-oriented law firms that had the establishment on retainer could, by and large, depend on conservative legal interpretations from judges with whom they could feel comfortable.

Outrageous? Of course.

The controversy even produced some national embarrassment for the Texas judiciary in a segment on CBS-TV's *60 Minutes* program, not unfairly entitled, "Is Justice for Sale?"

But did it produce meaningful campaign finance reform from the Texas Legislature? Unfortunately, no.

The pendulum on the high court has since largely swung back the other way, but less from a sense of real reform than from a compounding of the problem.

Doctors and business-oriented special interests dug deeper into their own pockets and — in key, high-dollar elections in 1988 and 1990 — bought their own justices to replace activist members of the high court.

I don't use the words "purchased" and "bought" in the sense that the trial lawyers or the business community backed specific judicial candidates who had overtly promised to rule a certain way on pending or anticipated cases.

I use them in the sense that each side dumped tons of money into the campaigns of judges and candidates whom backers believe or hoped would support their philosophical viewpoints on the bench.

The practice is clearly unhealthy because a fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.

The problem is an old one and has been discussed and studied at length. Now, it is being studied again by the new Texas Ethics Commission, which was instructed by the Legislature to look into the problem of financing political campaigns generally and judicial campaigns in particular.

Special interest campaign financing is a problem in all statewide races and many local races as well, but most critics view the potential tainting of judges with particular alarm because they believe the interpreters of the law should be more independent than most other public officials, including those who write the law.

The issue is more than just campaign finance. It also involves the way Texas selects its judges. And most of the concern is focused on the Texas Supreme Court, whose members are unknown to most Texans but, as the state's court of last resort in civil cases, has tremendous power over our system of justice.

As long as members of the Supreme Court have to seek election statewide against opponents who, like themselves are unknown to most voters, campaign contributions will continue to be crucial to their success.

"Texas is a big state, and there is not way to communicate that is cheap," Chief Justice Tom Phillips told the Ethics Commission last week.

Even after voluntarily limiting individual contributions to his campaign to $5,000, Phillips still managed to raise and spend a record $2.5 million in a hotly contested race against a trial lawyer-backed opponent two years ago. And those costs promise to continue to escalate.

Changing to a system of appointed judges, creating a non-partisan ballot for judges, shortening the campaign season with a

later primary or imposing a system of taxpayer financing of judicial races all have been discussed as potential solutions.

But the Legislature has consistently refused to change the judicial selection process and isn't likely to unless ordered by the federal courts, and lawmakers aren't likely to approve public financing of judicial campaigns in the midst of state government's continuing financial problems.

Some experts think the federal courts will eventually order major changes in the way Texas selects its judges. But, for now, the most reasonable solution is the imposition of strong limits on the amount of money that judges and judicial candidates — and all other political candidates, for that matter — can raise.

Robinson is chief of the Chronicle's Austin Bureau.

APPENDIX J

The Houston Post
Wednesday, September 2, 1992

Law firms top donors to justices
Trial layers urge reform of campaign law

By Mary Lenz
Post Austin Bureau

AUSTIN — Justice may not be for sale in Texas, but it's costing trial lawyers more than they want to pay.

Law firms in 1991 and 1992 contributed three times as much to both Democratic and Republican candidates to the Texas Supreme Court as doctors, political action committees or businesses.

Special interest groups so far have made 79 percent of all contributions to candidates seeking Supreme Court seats, according to a study released Tuesday.

Austin trial lawyer David Bragg said a group of trial lawyers commissioned the $50,000 analysis of more than 47,500 campaign contributions.

They wanted to document the amount spent on successful high court candidates by banks, insurance companies and other big businesses since 1988.

Bragg said consumer groups "are having fewer favorable decisions out of the court today than we have had in the last decade.

Asked if that means trial lawyers aren't getting their money's worth for their campaign contributions, Bragg said: "That's one way to look at it."

In 1991–1992, lawyers contributed nearly $1 million to Republican Supreme Court nominees and $877,000 to Democratic candidates. PACs followed, donating $323,000 to Republicans and $135,000 to Democrats. Doctors and other medical professionals trailed with $152,000 to Republicans and $8,710 to Democrats.

State law sets no limits on campaign contributions to candidates for nine Supreme Court posts. They serve staggered, six-year terms.

Doctors, lawyers, bankers, insurance companies, as well as businesses and various PACs ponied up 87 percent of the $11 million spent by winning Supreme Court candidates in 1988 and 1990.

In 1991–1992, Texas' top 25 defense law firms poured $442,821 into the campaign chests of Supreme Court candidates, with their opponents in plaintiff law firms throwing in $317,623.

Tracing law firm contributions is complicated by the practice of "bundling," or having a firm's employees make smaller contributions individually. Bragg said forcing law firms to report the total of their contributions would be a step toward reform.

Activists at the news conference to release the study differed on solutions, though they unanimously oppose giving the governor power to name Supreme Court justices.

Bragg called for public financing for Supreme Court races, and Tom Smith of Public Citizen suggested banning private contributions and financing the elections by adding $10 to the cost of filing each lawsuit.

APPENDIX K

Houston Chronicle
Sunday, Dec. 6, 1992

Selecting our judges — are single-member districts the answer?
Other reforms would serve Texas' legal system better

By Judge Michael T. McSpadden

McSpadden is judge in the 209th State District Court here.

The November defeat of state District Judge John Kyles here has renewed calls for single-member judicial districts to ensure politically correct numbers of minorities on the bench. Although this may sound like a valid objective, it would effectively sacrifice whatever is left of the independence of the judiciary.

Not surprisingly, we have heard once again the baseless cries of racism simply because Judge Kyles is African-American. I submit there were other more compelling reasons for his defeat.

For the past 10 years we have witnessed at the courthouse many of the most qualified judicial candidates lose because of partisan politics, with the uninformed straight-party lever pull on both sides dictating race after race at the bottom of the ballot. I have had many friends like Judge Kyles who have lost because of partisan politics, name identification and other factors which in no way relate to judicial qualifications and competence.

For the past several elections, I have sent a letter to all my fellow judges urging them not to "group together" with other judges of the same political party in promoting a straight-party vote. To me, judges who engage in this become nothing more than two-bit politicians at best. I also ask them not to accept any contributions from attorneys who work in their courts because of the automatic appearance of impropriety.

During the campaign season, Judge Kyles appeared on a television show and urged a Clinton/Gore vote, upsetting many voters who have every right to expect their judges to be above partisan politics. After seeing the interview, I called Kyles as a

friend and told him that his political statements were inappropriate by a judge and suggested that he make sure that portion of the interview be deleted if shown again. He offered the excuse that it was his understanding when he filmed the interview that the statement would be edited.

It has been reported that Kyles spent $150,000 on his campaign, with the vast majority of contributions coming from lawyers. I think the voters would have been more impressed had he not accepted any contributions from attorneys in the criminal law area and made that a campaign reform issue. His opponent also just happened to be a woman during the "Year of the Woman."

More importantly, Kyles was a political appointee of Gov. Ann Richards, which would certainly be a huge liability with all the publicity over the widely publicized Lena Guerrero qualifications controversy. Many of Richards' judicial appointments were defeated across the state for this same reason.

These are, no doubt, considered insignificant details by Judge Al Green of the local chapter of the National Association for the Advancement of Colored People and by columnist Lori Rodriguez of the Chronicle. To them, the call of racism is the automatic and unqualified response. This unsupported response will always provide Judge Green with media coverage at his press conferences and will provide Rodriguez with more interest in her column. And it will also further polarize an already segmented community.

Our whole legal system is based on the public's faith that difference between parties are settled in a court of law and not on the streets. Whether it is a civil dispute, a child custody hearing, the probate of a will or a criminal charge, every person entering a courtroom door should have complete assurance that he or she will be treated fairly by our judicial system. Right now in Texas we have some serious problems in justifying this public trust. The *60 Minutes* program on *Justice For Sale* and the recent HBO documentary on our family law courts have focused on these problems causing the Texas judicial system to be held with little respect by the rest of the nation. And, unfortunately, there are valid reasons for this.

We have perpetuated a system where we place our judges in the political arena every four years for our trial courts and every six years for our appellate courts. Because of our partisan election

of judges, we see almost all of our jurists wholly dependent upon the attorneys who practice before their courts for campaign expenses and upon the respective political parties as a base of support. With many of our judges, loyalty to the political party overshadows any semblance of loyalty to the judiciary. This is not the independence of the judiciary our forefathers envisioned when they created this separate branch of government.

In order to restore integrity in our system, our lawmakers must make decisions concerning judicial selection and judicial campaign contributions based upon the public's need rather than political party considerations.

Either a non-partisan countywide election or a non-partisan appointed/merit election of our judges would be the better method of reducing politics in the judiciary and also placing the most qualified candidates on the bench.

Not long ago, U.S. Supreme Court Justice Sandra Day O'Connor was the featured speaker at a local dinner. I was able to ask her about her thoughts on judicial selection. She stated the her home state of Arizona had changed from partisan selection to an appointed/merit election and that the quality of the judiciary had improved 100 percent. Justice O'Connor said that this change also solved the need for campaign contributions from the attorneys.

Single-member judicial districts would put a premium on quotas and politics and would, in effect, diminish what should be the most important consideration — the independence and competence of our judiciary. Reducing our judges to be representatives of a particular district would place a political albatross over the judiciary forever.

Further, a plan involving single-member districts would be retreating to a concept of segregation of our community based upon race, a thought which should be abhorrent to us all.

A contribution cap of $200 from any attorney who works in that area of law would go far in removing the obvious appearance of impropriety that automatically exists whenever a judge receives a large amount of money from attorneys who practice before the bench. If only our legislators would make these two essential changes, they would create a more efficient and equitable system both for us and future generations.

But this is probably not going to happen since it would call upon our lawmakers to find the courage to take a non-partisan stand for the benefit of those they represent. And the words "courage" and "lawmakers" have never been synonymous in the history of our state.

APPENDIX L

B. ANSWER TO ACTIONS OF TRIAL COURT
(from Petitioners' Application for Writ of Error)

The ruling of the Texas Supreme Court is clear as to jury issues. The judge may refuse to submit an issue only if no evidence exists to warrant its submission. Refusal to submit the jury issue was reversible error. *Brown v. Goldstein*, 685 S.W.2d 640, 41, 42, 43 (Tex. 1985).

The District Court refused to submit a Special Issue to the jury on the breach of good faith and fair dealing, breach of contract, mental anguish, and forgery relying on its erroneous partial summary judgment. The evidence of all refused jury issues is clearly set out on p. 15 of Appellants' Opening Brief.

Forgery of Deed of Trust was charged in hearing on June 27, 1988. (SF testimony of Dale Everett at hearing to remove receiver, June 27, 1988 p. 125-27). L. Rand Dennis stated that numerous loan-security documents, relied on by TCB, were forged. The Bank brought forth an "expert" who testified there was no forgery. Schwager was not allowed to produce rebuttal expert testimony proving that the documents were, in fact, forgeries. The District Court refused to submit Plaintiffs' special issue on forgery. (Tr. 1191-1212). This refusal hopelessly prejudiced Appellants. The jury could draw but one conclusion from the District Court's failure. When Schwager testified about the forgeries, conspiracy, etc., he was lying.

Likewise, although conspiracy was discussed throughout the trial, the charge was silent on the issue and did not present Plaintiffs' theory of the case. The refusal of all of these submitted issues was gross error which, in effect, prevented Petitioners from presenting their theory of the case. To the extent that TCB allowed or admitted evidence and testimony bearing upon the breach of duty of good faith and fair dealing and forgery, TCB waived any

right to rely on the previous partial summary judgment entered in its favor—even if such judgment was correct.

The District Court erroneously granted a directed verdict on Appellants' claim against TCB for wrongful acceleration and forgery. (SF November 22, 1989 pp. 130-131).

Both notice of default, intent to accelerate and notice of acceleration are required unless waived. Failure to provide any of the notices is fatal to any subsequent acceleration and foreclosure. *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232 (Sup. Ct. of Tex., 1982) at p. 234. Citing *Alan Sales & Serv. Center, Inc. v. Ryan*, 525 S.W.2d 863 (Sup.Ct. of Tex., 1975) at pp. 865-866. TCB gave no—

> "Clear, positive, and unequivocal declaration in some manner . . . of its intent to accelerate the note if default were not cured within reasonable time before it lowered the boom." *Crow v. Heath*, 516 S.W.2d 225 at p. 229.

Shumwaye Tux v. Horizon Credit Corporation, C-8669 (Tex. 1991).

Additionally, it is undisputed that TCB delayed over two months after the purported default of January 19, 1987, from taking any collection action and purportedly "negotiated" with the Appellants and the Limited Partners concerning restructuring of the note and/or cure. The TCB's long delay constituted conduct of negotiation which prevented TCB from declaring an immediate acceleration. *Alaska State Bank v. Fairco*, 674 P.2d 288 (Alaska, 1983). After these months of delay, TCB was required to provide notice of default and a reasonable opportunity to cure before declaring any acceleration. TCB failed to do this consequently the acceleration was illegal. The promissory note utilized by TCB required notice of default and a ten-day opportunity to cure. (Tr. 1125-26). The provisions for notice of default and notice of acceleration must be complied with for non-monetary as well as monetary defaults. *Covington v. Burke*, 413 S.W.2d 158 (Ct. of Civ. App., Eastland, 1967) at p. 160. See also *Jernigan v. O'Brien*, 303 S.W.2d 515 (Ct. of Civ. App., Austin, 1957) at p. 517. The record is devoid of any

evidence that TCB demanded payment of past due installments and/or a cure of any non-monetary defaults, within a reasonable time, prior to its purported acceleration.

The Trial Court "gutted" the Schwagers' case against TCB at the close of the Schwagers' case. Despite clear wording in the contract to the contrary, the Court excused TCB's failure to provide notice and granted directed verdict on the Schwagers' claims of breach of contract and wrongful acceleration. (SF Vol. 11-21-89 p. 246, LL 1-25; p. 247, LL 1-25; p. 248, LL 1-25). The Trial Court erroneously ruled that actual notice of the default excused TCB's compliance with the notes' notice provisions. ((SF Vol. 11-21-89 p. 253, LL 2-11) and the laws of Texas).

The District Court should have submitted an Issue to the jury, as requested by Appellants, on wrongful acceleration, forgery, breach of the duty of good faith and fair dealing, breach of contract and mental anguish. This failure to do so mandates reversal. Furthermore, the District Court erred in granting a directed verdict in favor of TCB, on Schwagers' claims for wrongful acceleration and forgery.

The Schwager Parties did not voluntarily withdraw their affirmative counterclaim for conspiracy. They also retained the right to use fraud and forgery with other claims. Tr. 888-894. Appellants claimed the affirmative defense of forgery in their answer (Tr. 976). Thus, the live pleadings for trial contain forgery as a claim against TCB as well as the conspiracy against TCB and the Limiteds. (Tr. 907).

TCB's summary judgment, if in fact there was one, was only a *partial* summary judgment, which is interlocutory. The Court has the right to set aside this judgment at any time. Allowing evidence of all the counterclaims of Schwager Parties negated any effect of the partial summary judgment and thus tried the case by consent. *City of Houston v. Socony Mobil Oil Co.*, 421 S.W.2d 427, 428, 430 (C.A. Texas—Houston [1st Dist.] 1967). It is also noted that the partial summary judgment did not eliminate claims made against the Limiteds. *Gainsville Oil & Gas v. Farm Credit Bank*,

795 S.W.2d 826 (Tex. App.—Texarkana 1990). Limiteds did not request a summary judgment.

The burden of proof is on the movant to establish his right to a summary judgment. Non-movant lack of answer does not entitle movant automatically to a summary judgment. *Harley-Davidson Motor Co. v. Young*, 720 S.W. 211, 213, 214 (Tex. App.—Houston [14th Dist.] 1986). Partial summary judgment is based on Ed Stringer's perjured testimony. When the credibility of the affidavit is in question, a summary judgment is not proper. *Soodeen v. Rychel*, 802 S.W.2d 361, 365 (Tex. App.—Houston [1st Dist.] 1990).

In order for judgment to be valid, it must be signed or orally pronounced in court with a record made of this announcement. The docket sheet is not evidence of any judgment being rendered. *Miller v. Kendall*, 804 S.W.2d 933, 943, 944 (Tex. App.—Houston [1st Dist.] 1990).

The right to discuss the Borrower Statement was reserved as previously indicated. TCB's attorney, Mr. Cheavens, was the one who solicited the information on the forgery of the Borrowing Statement (S.F. 752), not Mr. Schwartz. S.F. 1568-1569. Mr. Cheavens did not make any objection to the forgery evidence, but continued to extract 18 pages of testimony (S.F. 752-780) on the forgery claims. TCB later called a handwriting expert to testify, and Mr. Cheavens solicited another 28 pages of testimony on the forgery issue. S.F. 1494-1522. Schwager Parties' attorney, Mr. Nixon, then cross-examined the handwriting expert for an additional 18 pages of testimony on the forgery claim. Schwager Parties' rebuttal handwriting expert was not allowed to testify. (S.F. 1695, 1696). A bill of exception was made. (S.F. 1697). Appellants do not admit that the forgery claim was for rebuttal purposes only. As previously stated, forgery was an affirmative defense properly pled. A judge may refuse to submit an issue only if no evidence exists to warrant its submission. Refusal to submit the jury issues on forgery (Tr. 1191) was reversible error. *Brown v. Goldstein*, 685 S.W.2d 640, 641, 642, 643 (Tex. 1985).

The law on directed verdicts states that the "court must consider all evidence in the light most favorable to the party against whom the verdict was instructed, discarding all contrary evidence and inferences." *Collova v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978).

Forgery of the deed of trust was charged in the hearing on June 27, 1988 Hearing to Remove the Receiver 6/27/88, pp. 125, 127. TCB never named an expert to testify about the forgery in any document until trial. The judge committed reversible error in allowing an unidentified expert to testify. The June 1988 hearing was presided over by Judge Wittig, who certainly was aware of the claim of forgery of the Deed of Trust.

TCB entered evidence of good faith early in the trial. There is in excess of 50 S.F. references in Appellants' Point of Error #7. This was accomplished without any objections. Again, the Summary Judgment was interlocutory and thus was set aside when this evidence was entered into the record. *Hays v. Sullins*, 442 S.W.2d 494, 496 (C.A. Texas—El Paso 1969); *also Brown, supra.*

Clearly, the issue of good faith and fair dealing is a fact issue to be determined by the jury. *Security Bank v. Dalton*, 803 S.W.2d 443 (Tex. App.—Fort Worth 1991). As Appellees admit, the duty of good faith and fair dealing can be contracted for. There was an imbalance of bargaining power between TCB and the Schwager Parties.

The Guaranty Agreement clearly establishes the duty of good faith as it is covered by the U.C.C. This was a document prepared by TCB and was required by them as part of the loan. (Pl. Exh. 18A, p. 2, ¶ 10). Also, the equipment, furniture, and fixtures were covered under U.C.C. financing statement which also required a duty of good faith and fair dealing. The TCB loan was not a "real estate loan transaction," but a business loan, the proceeds of which were used to pay off an existing debt and provide working capital. (Stephen Smith Testimony Hearing July 14, 1986, pp. 8-13). The U.C.C. states the following: "U.C.C. 1-203 - Obligation of Good Faith. Every contract or duty within this title imposes an obligation

of good faith in its performance or enforcement." "Good faith - means honesty in fact in the conduct or transaction." *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1027, 1032 (5th Cir. 1991).

Schwagers in their response to TCB's Motion for Summary Judgment, Tr. 888, clearly and unequivocally claim that this second acceleration was also wrongful. The harshness of the option of accelerating the maturity of an extended obligation requires both a strict reading of the terms of the option and notice to the debtor. *Brown v. Hewitt*, 143 S.W.2d 223 (Tex. Civ. App.—Galveston 1940).

CONCLUSION

Schwagers seek appellate review of a substantial monetary judgment entered against them in error. The court of appeals failed to consider the judgment entered in Case #86-07376 as final. The trial court did not have jurisdiction to consider Cases #86-07376 and #87-14551 and retry Case #86-07376 as a consolidated case. This judgment should have been reversed and dismissed as set out herein.

Suffering an erroneous adverse judgment and the denial of appellate review, Schwagers respectfully request this Honorable Court's intervention so that justice may be done. Meaningful appellate review should not be denied in this case.

Ironically, it was the 1st Court of Appeals in *Texaco v. Pennzoil*, 729 S.W.2d 768, 815 (Tex. App.—Houston [1st Dist.] 1987), that ruled "Having failed to brief points 7-8, Texaco has waived any allegations of error, but in the interest of judicial economy we will consider the argument." Does the 1st Court of Appeals practice a double standard?

PRAYER FOR RELIEF

Wherefore, Petitioners, "Schwagers," request that this Application for Writ of Error be granted and that the Supreme Court reverse the judgment and dismiss the case for lack of jurisdiction. Alternatively, Petitioners request that the judgment of the Court of

Civil Appeals be reversed and remanded to the Court of Civil Appeals for consideration of the merits of the previously unreached points of error. Alternatively, review the unreached points of error for merit and remand the case to the district court for a new trial. Petitioners respectfully request such other and further relief to which they may be justly entitled.

Respectfully submitted,

T. Ransom Cornish
State Bar No. 04836100
3131 Eastside, Suite 330
Houston, Texas 77098
Telephone: (713) 528-1937
Fax: (713) 523-0547
ATTORNEY FOR PETITIONERS

APPENDIX M

ANSWER TO 1ST COURT OF APPEALS' ORDER OF FEB. 24, 1992

APPENDEX III
(from Petitioners' Application for Writ of Error)

The Appeals Court grouped points of error in its opinion of Feb. 24, 1992. TCB in its Reply Brief filed 7/29/91 also grouped points of error in violation of TRCP 74(c). The preceding has made it extremely difficult to answer the Appeals Court order striking 42 of Petitioners' 44 points of error.

The following shows that the Appeals Court erred when it struck 42 of 44 points of error. (Opinion Feb. 24, 1992).

a. Point of Error #2 - The Petitioner did set out in the record where the complaint was presented to the trial court and received an adverse ruling. This was clearly shown in S.F. Ref. 178-186, p. 7, of Appellants' Opening Brief where Judge Wittig admitted this. The culmination of the res judicata issues was alluded to at the very end of the trial when the trial judge, Don Wittig, begged the appeals court's indulgence for his error and indicated he had looked at the entire record while wrestling with the problem. (S.F. Vol. 10, pp. 1738, 1739). This reference was made on p. 9 of Appellants' Opening Brief. The other S.F. references in this point show other res judicata objections and the ruling. Motion for New Trial (Tr. 1257 p. 3 also shows objection for res judicata. This motion was denied by the trial judge Tr. 1331. Point of Error #24. Judge Wittig also acknowledged the issue of res judicata in S.F. Ref. Vol. 6, p. 1080, and he overruled the objection on page 1090 (p. 7 Appellants' Opening Brief). Appellants' Response Brief point #2 is in addition to these arguments (pp. 11-14). Res judicata objection was made and denied. Appendix pages A2-1, A2-2.

b. Points of Error 5, 38, 43.

Point of Error #5 - Schwagers' complaints were made in S.F. reference on page 12, e.g., 11/20/1989, pp. 49-51. The reference also contained the adverse rulings. Also, objections were contained in Petitioners' Motion for New Trial Tr. 1257 pp. 23, 26, 31 and 36 which was denied Tr. 1331. *See also* Point of Error #24.

Point of Error #38. - TRCP 324b and 329b require a Motion for New Trial to preserve evidence and insufficiency of evidence points of error. This was accomplished in Motion for New Trial p. 23 Tr. 1257 and denied in Order dated 2/27/90 Tr. 1331.

Point of Error #43 - S.F. Ref. 11/12/89, pp. 107-109 shows the submission and objection to the Parol Evidence. Response Brief 2/13/92 Response Points lists four authorities for Point of Error 43.

c. Point of Error #9 - there are in excess of three pages of fact references in this point of error. TCB in the Reply Brief even admits that an adverse ruling was made (vol. 11/22/91, pp. 129-131) in their Reply Brief of page 221. Also Motion for New Trial Tr. 1257, p. 31 which was denied. Tr. 1331.

d. Points of Error #18 and 19.

Point of Error #18 - It is incredible that the Appeals Court stated that there was no objection and adverse ruling on this point. This point of error reference S.F. 11/21/89, pp. 3-52, shows this information. This is the same complaint made by TCB in its Reply Brief which was answered in Schwager's Response Brief Response Point #14, pp. 34-36. On page 3, line 13 (S.F. 11/21/89, pp. 3-52, Mr. Nixon, Schwager's Attorney, stated "I object to Zimmerman being called . . . ." Page 6, L. 17. Judge Wittig stated, "Okay, the Court overrules your objection."

Point of Error #19 - S.F. Ref. 694, 695 clearly shows when Judge Wittig was not going to let Judge O'Brien testify based on TRCE 605. These same objections were made by TCB and answered in detail in Appellants' Response Brief, pp. 36-38 Response Point #15. Also Point of Error #19 contains in excess

of 40 pages of S.F. references that rebut Appeals Court claim of waiver of this Point of Error.

e. Points of Error #21 and 24.
Point of Error #21 - Each reference made in point on bias shows the objection to this bias and prejudice of the trial court. The Appeals Court could not have expected Mr. Nixon to complain about the judge's conduct after the time of the trial was set at the beginning when he admonished Mr. Nixon. S.F. 26 and 27.
Point of Error #24 - The Appeals Court makes the same objection that TCB made in its Reply Brief. This was thoroughly answered in Appellants' Response Brief Points # 16 and 17. This Court is requested to note p. 41 of the Response Brief Point #17 in relation to the legal expert Alfred Zimmerman's testimony at trial. It was Zimmerman's law firm that gave the argument against the Motion for New Trial. Response Point #17 contains three authorities.

f. Point of Error #25 - this point of error contains S.F. references and objections to the judgment issued in Case #87-14551. Further, Response Points #19 and 20, Appellants' Response Brief show that objection was made to judgment and adverse ruling made. Also, objections were made in Motion for New Trial 1257, pp. 32-37 and denied by order (Tr. 1331). Also Tr. 1257 pp. 22, 23, 25, 26.

g. Point of Error #30 - The complaints about this point of error are covered in Response Brief Point #24. Further, Mr. Schwager's own attorney's testimony was the basis for him being held in contempt and being denied a jury trial on the excessive $1,000 fine and 3 days in jail ruling by Judge Wittig. (Constitutional right to a jury trial if fine exceeds $500.)

h. Point of Error #33. The objection and denial to the Point is shown in Motion for New Trial Tr. 1257 p. 30 and the Denial Tr. 1331 *See also* Point of Error #24.

i. Points of Error #35 and 44.

Point of Error #35 - Objection and denial was made as required by TRCP 324(b). Motion for a New Trial 1257 pp. 22, 23, 25, 26 Denial Tr. 1331. This is also shown on page 45 of Appellants' Brief. *See also* Point of Error #24 and Response Point #26.

Point of Error #44 - Was to be read in conjunction with Points of Error 25 and 35. Response Point #26 also contains answers to complaints about Point of Error #44. Point of Error #44 contains the legal authorities for Point of Error #35.

j. Points of Error #36, 37, 38 and 39. These points of error were not answered by TCB. These points of error are covered in Tr. 1257 Motion for New Trial, (pages 23, 24, 25 and 26), which was denied. Tr. 1331. TRCP 324b was complied with. TRCP 329b was also complied with. *See* Point of Error #24.

k. Points of Error #40, 41 - These points of error were answered by TCB as part of its answer to Appellants' Point of Error #2. Motion for New Trial 1257 - pp. 24, 35, 36 objected to these jury issues. Order of 2/27/90 Tr. 1331 denied Motion for New Trial. *See also* Point of Error #24.

l. Points of Error #3, 11 and 29. The authorities for these points of error are contained in their respective Response Points.

Point of Error #3 - Response Point #3, pp. 15 and 10 contain no less than six cases for Appellants' Point of Error #3, starting with *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362, 363 (Tex. 1971).

Point of Error #11 - Response Point #10, pp. 23 and 24 contain no less than five cases for Appellants' Point of Error #11, starting with *Walker v. Sharpe*, 807 S.W.2d 442, 446 (Tex. App.—Corpus Christi 1991).

Point of Error #29 - Response Point #2, pp. 11, 12 & 13 contain no less than seven cases for Appellants' Point of Error #29, starting with *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 821 (Tex. 1984).

In addition the objection and adverse ruling shown under Point of Error #2 S.F. Vol. 11/21/89, pp. 157-159.

m. Point of Error #6 - the appeals court totally ignores the fact that Appellants' claim the Summary Judgment is invalid as it was not signed. The Appeals Court's justification striking this point of error is wholly unfounded when entire point of error is read. Also the Appeals Court again ignored Appellants' Response Brief pp. 16, 17, 18. Response Point #4 which further shows the invalidity of Appeals Court ruling.

n. Points of Error #12, 20 and 14.
Point of Error #12 - The evidence sought to be admitted, its contents, and its refusal were not only shown in S.F. Ref. 226-258, but also in S.F. reference Vol. Nov. 21, pp. 67-79 and 134-140. (Page 21 of Appellants' Opening Brief). Page 22 again gives a list of the documents submitted and refused. (Defendants' Exh. 41, 42, 46, 54-66, 124). Appellants' Response Brief Response Point #11 conclusively removes any question about Appellants' Point of Error #12. It should be noted that Judge Wittig denied the evidence after admitting his vast knowledge of this case. S.F. 257, LL. 17-24.
Point of Error #20 - Point of Error #20 is to be read in conjunction with Point of Error #12 as noted on page 29 of Appellants' Opening Brief. When combined, these two points of error certainly discuss the substance of the excluded evidence. However, Appellants' Response Point #11, pp. 24-30 of the Response Brief gives the utmost detail on the contents of this excluded document, starting with "The excluded document would have proved fraud by trying to deprive Mr. Schwager of his interest in the property and the collaterally assigned Jow Note. Def. Exh. 124." "The excluded documents would have proved the conspiracy complained about by Appellants and reversed the judgment of the jury." The preceding is found at the beginning of the Response Point #11 on page 24.
Point of Error #14 - S.F. Reference 133-139 on page 25 of Appellants' Opening Brief clearly sets out where the financial information was submitted and refused. The document rejected contained the financial information of Limiteds as stated in Point of Error #14. Further, Response Point #11, pp. 24-30 of

Appellants' Response Brief filed 2/13/92 adds to the argument for Point of Error #14.

o. Points of Error #23 and 42.
Point of Error #23 - The evidence that raised the conspiracy issue was given to the jury. Appellants' Point of Error #7 sets out at least 100 references where evidence was introduced on conspiracy. As noted in this point of error, it is to be read with Point of Error #7.
Point of Error #42 - This point of error is also to be read with Point of Error #7. Reading of Appellants' Response Point #18, pp. 41-43 of Appellants' Response would fully eliminate the objections being made by the Appeals Court. Note: TRAP 74 states in the first sentence that briefs shall be brief and TRAP 74(p) states that the briefing rules should be construed liberally. Judge Cohen's interpretation of the requirements of 74(f) makes it impossible to adhere to the requirements of TRAP 74 and 74(p). The record of the refused jury charge along with a verbal statement of each conspiracy reference would take at least 20 pages of the allotted 50 pages for the Appellants' brief. This is extremely unrealistic in a complex case as Judge Cohen has stated this case was. In *Henry S. Miller*, a case that Judge Cohen rendered decision, the Appellants had a 47-page brief. Compare this case with *Henry S. Miller*:

	Henry S. Miller	Schwager
Transcript	651	2,200
S.F.	823	4,500
Exhibits	600 pages	100's of pages
Brief	47 pages	55
Refused jury Issue	Unknown	20 pages

Note: "Schwager" was three cases in one as noted by Judge Wittig and also included the '86 case, two summary judgment and a mandamus in the case on appeal.
Based on the preceding, Judge Cohen's ruling in Schwager case on appeal is unbelievably unfair. How could Schwagers

prepare an adequate brief on this complex case in 30 pages? This case also included five law firms and eleven parties.

p. Points of Error #15 and 17 - These points are to be read in conjunction with Point of Error #2. Appellants' Opening Brief (p. 26). Thus, authority for these points are contained in Point of Error #2, also showing the interrelationship of these points. Further, TCB in its Reply Brief answered Points of Error #15 and #17 with Reply Point #2. Appellants' Response Brief answered TCB's Reply Point with Response Point #2, pp. 11-14: there could not have been any question in the minds of the Appeals Court if they had read the Appellants' Response Brief filed 2/13/92. This brief was filed prior to oral argument and submission. Order striking Appellants' 42 points of error was *faxed* to Appellants on *Feb. 24, 1992.*

q. Point of Error #10. As noted by TCB in its Appellees' Brief, Point of Error #10 was replied to in Reply Points #2 and 9. Thus, Appellants Response Brief Points #2 and 9 had to be considered before Appeals Court struck this point of error. Jury strikes are fundamental error and argument made in Response Point # 9 clarifies questions on this point of error.

r. Points of Error #8 and 39.
Points of Error #2, 7, 8 and 39 are to be read together as shown on pages 1, 17, 18, 49 of Appellants' Opening Brief. S.F. Ref. Vol. 6, 1008 at p. 7 shows that the Limited Partners were in breach of the contract and had no right to sue Schwagers. This objection was overruled. S.F. Vol. 6 1090 at page 7. Court stated, "I will overrule the objection." S.F. Reference Nov. 21, 1989 pp. 243-255 at page 15 shows the objection and adverse ruling on the wrongful acceleration and breach of contract. Further, Appellants' Response Brief Point also clarifies this matter.

s. Point of Error #13 - Appellants' request for a 100-page brief was partly based on the appeal of the writ of mandamus (Feb. 1991). The ruling of the Appeals Court which complained

about the lack of detailed briefing, while not allowing Appellants the 100-page brief, is illogical and unfair.

However, the complaints made about Point of Error #13 are eliminated in Appellants' Response Brief in Reply to Appellees' Brief. The pages in Appellants' Response Brief are 30-33, Response Point #12.

t. Point of Error #16.
The evidence and objection to the evidence is shown in S.F. Ref. Vol. 11/21/89 pp. 44-63. Page 62 shows the offer of the evidence, and page 63 shows the adverse ruling. Further clarification of Point of Error #16 is demonstrated in Appellants' Response Brief, pages 33 and 34 (Response Point #13).

u. Point of Error #26 - Any concerns about this point of error are clarified by Appellants' Response Brief Response Point #21, pp. 46 and 47, and this point should be read in conjunction with Respondents' Point #2 as shown on page 47 of Appellants' Response Brief. The title of Point of Error demonstrates what the evidence admitted was.

v. Points of Error #27 and 28.
Point of Error #27 - S.F. References in this point show the evidence, the objection and adverse ruling. Vol. 6, pp. 1049, 1164-1169. However, in Appellants' Response Brief, pages 47-49 Response Point #22 a thorough discussion is made of Point of Error #27 and the complaints made by TCB in their Appellees' Brief Reply Point #22.
Point of Error 28 - As shown in S.F. Ref. Vol. 7, pp. 1253-56, Schwager was not allowed to justify closing the restaurant or anything else. However, in Appellants Response Brief, pages 49-50, Response Point #23, discusses in detail Point of Error #28 and TCB's objections made in its Appellees' Brief Reply Point #23. Authority is listed in Response Point #23 for Point of Error #28 and it also contains the substance of the evidence for this point of error.

w. Points of Error #31, 32 and 34.

Point of Error #31 - There was no rebuttal to Point of Error #31 by Appellees (TCB). However, the Appeals Court struck this point of error anyway. In *Henry S. Miller*, Judge Cohen stated at 134 that the Court did not represent the Appellants, so why here is he representing the Appellees?

Points of Error #32 and #34 - These points of error are expounded upon in Appellants' Response Brief, pages 52-55. Response Point #25. This is in response to TCB's Appellees' Brief Reply Point #25.

A motion for a New Trial (Point of Error #24) is a prerequisite to complain on appeal that evidence is factually insufficient to support jury finding and that jury finding is against overwhelming weight of evidence. TRCP 324(b) 2, 3. This motion was denied on 2/27/90 (Tr. 1331).

Appellants complied with TRCP 329b's filing requirements for Motion for a New Trial. When Rule 324(b) requires a motion for a new trial to preserve error, the complaining party is required only to comply with the filing requirement in Rule 329b to preserve the point of error. *Cecil v. Smith*, 804 S.W.2d 509 (Tex. 1991).

APPENDIX N

BETTE SCHWAGER'S DETAILED ARGUMENT

(from Appellants' Response Brief)

APPELLANTS' RESPONSE POINT #3 TO APPELLEES' REPLY POINT #3 TO APPELLANTS' POINTS OF ERROR #3 AND #25.

Bette Schwager has a constitutional right to plead and prove her causes of action. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362, 363 (Tex. 1971); *Derbigny v. Bankone*, 809 S.W.2d 292 (Tex. App.—Houston [14th Dist.] 1991).

Bette Schwager's claims were for breach of good faith, breach of contract, mental anguish, salary, punitive damages and attorney's fees. Tr. 907-935.

TCB required Bette Schwager to sign a Homestead Affidavit, thus having actual notice Bruce Schwager was married. (Tr. 929, 930, 931).

Community property subject to the joint management of both spouses cannot be encumbered by one spouse acting without the other's consent. *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.—Beaumont 1974); *Valone v. Miller*, 663 S.W.2d 97, 99 (Tex. App.—Houston [14th Dist.] 1983). Thus, TCB was required to have Bette Schwager sign pledge of Note. TCB cannot now be heard to say it was entitled to her one half of the Jow Note.

The holding in *Carlton v. Estate of Estes*, 664 S.W.2d 322, 323 (Tex. 1983), clearly demonstrates that when the suit directly concerns the *community property*, both spouses have the right to represent themselves. One spouse does not have the right to represent the other, as TCB claims.

It is undisputed that this lawsuit was about the community property "Jow Note," among other things. Rights of the wife may be affected only by suit in which she is called to answer. *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 202 (Tex. 1974).

There is no evidence that Bette Schwager put up her share of community note as TCB suggests, nor did she default on any loan. Appellees' brief 16.

Carlton certainly *does not* suggest that Bette Schwager did not have to be a party when the suit was about a *piece* of *community property*.

The court erred in awarding the entirety of the Jow Note to the Bank because one half of the Jow Note is Bette Schwager's community property. As she was not a party to the lawsuit in that the Bank sought no affirmative relief from her, as none was pled or proved, the judgment goes too far in awarding the entirety of the Note to the Bank. There was also no basis for granting injunction and equitable relief against Bette Schwager as no injunction, equitable or affirmative relief was pled or proved by the Bank against Bette Schwager. *E.A. Nichols v. J.D. Wheeler*, 304 S.W.2d 229, 230 (Tex. Civ. App.—Austin 1957).

The Jow Note interest of Bette Schwager was awarded to the Bank without her permission or approval. Tr. 1234, 1236. No service was made upon Bette Schwager by TCB. TRCP 124.

APPENDIX O

JUDGMENT CASE #87-14551

NO. 87-14551

TEXAS COMMERCE BANK, N.A.	§	IN THE DISTRICT COURT OF
	§	
VS.	§	
	§	
B.B.M.M., LTD., a Texas Limited Partnership, HARVEY RESNICK, MALCOLM MARCOE, WILLIAM R. CRAMER, BRUCE SCHWAGER, FRED FALLAS, AND MEYER FALLAS	§	HARRIS COUNTY, T E X A S
	§	
	§	125TH JUDICIAL DISTRICT

MODIFIED FINAL JUDGMENT

On the third day of November, 1989, came on to be heard the trial in the above entitled and numbered cause; said cause being the parent case into which Cause No. 86-07376, styled Bruce Schwager and B.B.M.M., Ltd. vs. Harvey Resnick, et al, and Cause No. 87-56638, styled City of Houston, et al, vs. B.B.M.M., Ltd., et al, were consolidated. All parties appeared in person and by virtue of their respective attorneys of record and announced ready for trial. Trial by jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empaneled and the case proceeded to trial on the merits;

At the conclusion of the case-in-chief of B.B.M.M., Ltd., Bruce Schwager, Bette Schwager, and B.M. Bayou Corporation, Texas Commerce Bank, N.A. moved for an instructed verdict which was granted as to the claims of B.B.M.M., Ltd. and Bruce Schwager against Texas Commerce Bank, N.A. on their claim of wrongful

acceleration and breach of contract. Other motions for instructed verdict were made and denied.

At the conclusion of all evidence, the Court submitted the case to the jury. The charge of the Court is incorporated herein by reference. On November 27, 1989, the jury rendered its verdict by answering the following jury questions as indicated hereunder:

. . . .

exemplary damages; in addition to such amount, Harvey Resnick recover from Bruce Schwager the sum of $42,000.00 as reasonable and necessary attorneys fees; and

8. Bruce Schwager, Bette Schwager, B.B.M.M., Ltd. and B.M. Bayou Corporation take nothing from either Texas Commerce Bank, N.A. or Charles Best; and

9. Bruce Schwager, Bette Schwager, B.B.M.M., Ltd. and B.M. Bayou Corporation take nothing from Meyer Fallas, Fred Fallas, Malcolm Marcoe, William Cramer, or Harvey Resnick; and

10. Harvey Resnick and William Cramer take nothing from either Texas Commerce Bank, N.A. or Charles Best; and

11. Bruce Schwager, Bette Schwager, and all of their attorneys, agents and employees, are permanently enjoined from taking any action, whether directly or indirectly, to collect any sum of money due under the terms of that certain promissory note, dated May 27, 1982, in the original principal amount of $189,500.00, executed by Wai Han Jow, and made payable to Space City Sizzler Corp.; and

12. Bruce Schwager, Bette Schwager, and all of their attorneys, agents and employees, are permanently enjoined from taking any action, whether directly or indirectly, to collect any rent for the use of the parking lot located at 110-112 Travis Street, Houston, Texas; and

13. The receivership established by this Court's "Judgment" dated October 14, 1986 is hereby dissolved. The receiver, Dale

APPENDIX P

ADVERSE PARTY PLEADINGS

Limited Partners' Trial Pleadings
Case #86-07376 July 11, 1988

14. In December of 1983, Schwager amended the Lease by forfeiting the Limited Partnership's right to collect rent from the Corporation for the year 1985. Such amendment was without the knowledge or consent of the Defendants. The Defendants asserted that such conduct constituted a breach of the Partnership Agreement and Schwager's fiduciary duty thereunder.

15. In or about January of 1986, the General Partner amended the Lease a second time under which the amount of rent to which the Limited Partnership would be entitled from the Corporation in 1986 would be 3% of the gross receipts that exceed $8,000.00/ month rather than the guaranteed minimum monthly rent of $10,500.00 as provided in the Lease. Such amendment was made by Schwager without the knowledge or consent of the Defendants. The Defendants assert that such conduct constituted a breach of the Partnership Agreement and Schwager's fiduciary duty thereunder.

16. The Defendants assert that Schwager has breached the Partnership Agreement by (i) failing to safe keep and use all of the Limited Partnership's funds and assets for the purpose and benefit of the Limited Partnership; and (ii) failing to keep a complete and accurate set of books as required by paragraph 18(a) of the Partnership Agreement.

TCB Trial Pleadings Case #87-14551 Oct. 19, 1989

Page 1

Bette Schwager has no standing to sue or recover in the capacity in which she sues. **Bette Schwager is not in privity of contract with TCB on the 825,000 Note, nor the documents securing its repayment.**

Page 3

TCB Pleads the affirmative defense of res judicata and collateral estoppel.

Limited Partners' Trial Pleadings
Case #87-14551 Mar 31, 1980

Page 1

Affirmative defense of res judicata, and/or collateral estoppel
Bette Schwager does not have standing to recover in the capacity in which she has brought suit in this cause.

APPENDIX Q

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Bruce B. Schwager, known to be the person whose name is subscribed to the foregoing instrument as Petitioner who, after being by me duly sworn, on his oath, did depose and testify that he had read the foregoing instrument, that all of the facts alleged therein are true and correct and within his own personal knowledge.

Bruce B. Schwager

SUBSCRIBED AND SWORN TO on this the 12 day of January 1993, to certify which witness my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:

2-22-94

CAROL S. COX
Notary Public, State of Texas
My Commission Expires 02/22/94

APPENDIX R

ARGUMENT FOR FINALITY OF JUDGMENT IN CASE #86-07376, 10/14/86

IN THE COURT OF APPEALS
FOR THE FIRST SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

BRUCE B. SCHWAGER, ET AL.	§	
Appellants,	§	
	§	CASE NO. 01-90-0270-CV
v.	§	
	§	
TEXAS COMMERCE BANK, ET AL.	§	
Appellees.	§	

MOTION FOR EN BANC REHEARING TO RECONSIDER ORDER OF MARCH 12, 1992 DENYING APPELLANTS' APPEAL
(Oral Argument Requested)

Ref.: Motion to Reconsider Order of Feb. 24, 1992 Striking 42 of Appellants' 44 Points of Error, as if fully set out herein. (Dated March 9, 1992)

TO THE HONORABLE JUSTICES OF SAID COURT OF APPEALS:

Come now Bruce Schwager, B.B.M.M., Ltd., B.M. Bayou Corporation and Bette Schwager, Appellants, by and through their attorney of record, T. Ransom Cornish, and move this Court for the entry of an order which vacates order of March 12, 1992, and grants relief herein requested. In support of said motion, Appellants would respectfully show unto the Court the following:

I.
POINT OF ERROR NO. 1

THIS JUDGMENT WAS ENTERED WITHOUT JURISDICTION AND IS THEREFORE VOID.

Appellants reassert this point of error. The Court erred in denying this point of error. The following is a response to page 6, paragraph 2 of March 12, 1992 Order. This Court has erred by ruling that the 1986 judgment is "intrinsically interlocutory" because it appoints a receiver. This Court does not give any case law to support its position but refers to Tex. Civ. Prac. & Rem. Code Ann. § 51.014(1) (Vernon Supp. 1992). This statute does not state that every order appointing a receiver is interlocutory, nor does it even imply it. § 51.014 is to allow one to "appeal from an interlocutory order which appoints a receiver." The reason for § 51.014 was to allow for an appeal of an interlocutory order. An interlocutory decree "is one made pending the case and before the final hearing on the merits." *Magnolia Petroleum Co. v. Jackson*, 80 S.W.2d 388, 389 (C.A. Tex. Texarkana 1934); *also First Nat'l Bank of Dallas v. Brown*, 53 S.W.2d 604, 605 (Tex. 1932).

The 1986 Judgment was entered after a conventional trial on the merits. (Motion to Reverse Judgment and Dismiss Case Sept. 12, 1991) Exh. "A."

The following cases demonstrate that the appointment of a receiver after a conventional trial on the merits does not result in an interlocutory order and does not affect the finality of the judgment. *Magnolia Petroleum Co. v. Jackson*, 80 S.W.2d 388, 389 (C.A. Texarkana 1934); *First Nat'l Bank of Dallas v. Brown*, 53 S.W.2d 604, 605 (Tex. 1932); *Dunn v. Dunn*, 439 S.W.2d 831, 833 (Tex. 1969); *Moody v. State*, 520 S.W.2d 452, 456, 457 (C.A. Tex. Austin 1975, RNRE); *Citizen's State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988).

In addition, the following cases show that the finality of the judgment is not affected by the fact that future proceedings are expressly provided for in the face of the judgment to carry the

judgment into full effect. *Hargrove v. Insurance Inv. Corp.*, 176 S.W.2d 744, 746, 747 (Tex. 1944); *Medical Administrators v. Koger Prop.*, 668 S.W.2d 719, 722 (Tex. App. 1 Dist. 1983); *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975).

The trial court did not have jurisdiction to consolidate Case #86-07376 and Case #87-14531 after judgment in Case #86-07376 which became final on Nov. 14, 1986. *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988); *Grayson Cty. Officials v. Dennard*, 574 S.W.2d 179, 182 (C.A. Texas Eastland 1978).

For this Court to suggest that the receivership would be perpetual if the court did not consolidate the two cases is erroneous. Surely, the court in Case #86-07376 could have terminated the receivership.

Dissolving the receivership in Case #87-14551 was improper. The receiver was appointed in Case #86-07376. A receiver was never appointed in Case #87-14551.

The 1986 judgment was executed in Case #86-07376 by visiting Judge Price on Mar. 4, 1988. This was done in the 1986 Case Number. (Tr. 639, 642). Judge Price was then the second judge to recognize the finality of the 1986 Judgment.

The Court also suggests that because the Judgment does not say final judgment, it is an interlocutory judgment. Thus, no matter what the content of the judgment or the basis for its issuance would be, as long as it says final judgment, it would be final. The heading on the judgment does not determine whether a judgment is final or interlocutory. It only shows the intention of the court. *McClennahan v. First Gibraltar Bank*, 791 S.W.2d 607, 608, 610 (Tex. App.—Dallas 1990); *Winfield v. Daggett*, 775 S.W.2d 431, 433, 434 (Tex. App.—Houston [1st Dist.] 1989).

The Supreme Court also ruled that a judgment did not have to say final in order to be a final judgment. The Court recognized as

final a judgment that was headed "Amendment Judgment." *B & M Machine Co. v. Arionic Enterprises*, 566 S.W.2d 901 (Tex. 1978).

The intention of Judge O'Brien in Case #86-07376 is shown on the Docket Sheet (Tr. 1347) which states "10/14/86 "*Final Judgment Signed*" (underlined for emphasis).

Judge O'Brien further stated the finality of the 1986 Judgment on May 26, 1987 when he stated, "The 1986 lawsuit is over and final." (S.F. Hearing May 26, 1987, p. 34, lines 24, 25).

The Court further suggests that because the judgment did not deny all relief not expressly granted, it automatically was an interlocutory order. "Mother Hubbard" provision stating that "All relief not expressly granted herein is denied" does not convert an intrinsically partial summary judgment into a final appealable order, and the converse is true that leaving out this statement does not make a final judgment not final. *Sakser v. Fitze*, 708 S.W.2d 40, 41, 42 (Tex. App.—Dallas 1986).

The contents of the "Mother Hubbard" clause is only a recommendation and is not a mandatory requirement for a judgment to be considered final. Following a conventional trial on the merits, a judgment is presumed final. *Houston Health Clubs v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986).

The general rule of *North East Indep. School Dist. v. Aldrige*, 400 S.W.2d 893 (Tex. 1966), is that after a conventional trial on the merits, judgment entered is presumed final. *Walker v. Sharpe*, 807 S.W.2d 442, 445, 446 (Tex. App.—Corpus Christi 1991).

A final judgment fully disposes of all issues and all parties in the lawsuit.

> However, a judgment which settles all the legal issues and rights between the parties is final and appealable "though further proceedings may be necessary in the execution of it or some incidental or dependent matter may still remain

> to be settled." *Hargrove v. Insurance Investments Corp.*, [142 Tex. 111] 176 S.W.2d 744, 747 (Tex. 1944).

Reviere v. Spragins, 810 S.W.2d 298, 300 (Tex. App.—Fort Worth 1991).

> In determining whether a judgment is final "Texas Courts have always given consideration to the nature of form and effect of the judgment. In arriving at whether or not a judgment is final the pleadings and evidence *must* also be taken into consideration . . . ." *Ferguson v. Ferguson*, 16 Tex. 184, 338 S.W.2d 945, 946 (Tex. 1960).

Reviere, supra at 301 (emphasis added).

The receiver appointed in Case #86-07371 was done on the court's own motion to aid in execution of its judgment. (S.F. Hearing May 26, 1987, pp. 35, 36).

The receiver's only function was to operate as a real estate agent and to sell the property. The receiver had nothing to do with the operation of B.M. Bayou Corp. (restaurant) or the Limited Partnership, B.B.M.M., Ltd. In fact, the receiver did not even have a key to the premises at 110-112 Travis Street. (S.F. Hearing on Emergency Motion for Supplemental Order Approving Sale by Receiver May 20, 1988, vol. I, pp. 54-56).

It is mandatory that the Court review the pleadings and evidence in determining the finality of the judgment. *Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). This obviously was not accomplished by this Court as evidenced by the reasoning behind its order of March 12, 1992. The issue of the 1986 lawsuit was whether the court was going to uphold the B.B.M.M., Ltd. Partnership Agreement and not dissolve the Partnership as requested by the Limited Partners. This dissolution of the Partnership was requested based on the wrongdoing of the General Partner, Bruce B. Schwager. The wrongdoing complained of, among other things, was a *breach of fiduciary duty*.

Not only was the Partnership not dissolved by the Judgment in Case #86-07376, but the Limited Partners were ordered to pay $14,000/mo. in capital contributions, or forfeit their interest. Further, the 125th District Court Judge Michael O'Brien previously ordered Mr. Schwager to continue to operate the restaurant under its current conditions. (Rendition of Judgment Letter Aug. 8, 1986) Exh. "A" in Motion to Reverse Judgment and Dismiss Case, Sept. 12, 1991).

The judgment in the 1986 case was ruled final as previously indicated in this motion by Judge O'Brien and Judge Price. In addition, Judge Wittig's ruling concerning the date of Aug. 11, 1986 also recognizes the fact that the 1986 Judgment was final.

TCB in its reply brief also recognized that the 1986 Judgment was final. The Limited Partners' attorney in the 1986 case, Joe Cohen, also recognized that the 1986 Judgment was final. (Exh. "B" page 2 Motion to Reverse Judgment and Dismiss Case Sept. 12, 1991). The files of the First Court of Appeals also demonstrate that the 1986 Judgment was final when it stated that no appeal was filed in the 1986 case.

APPENDIX S

TEXAS ELECTION CODE

§ 251.003. Campaign Contributions

(a) It shall be lawful for an individual not acting in concert with any other person to expend a sum in a campaign which shall not in the aggregate exceed $100 per election for any lawful purpose out of his own funds to aid or defeat any candidate or measure, where the sum is not to be repaid to him. Such a sum will not be reportable to any authority unless it constitutes a contribution. If an individual not acting in concert with any person wishes to expend more than $100 for any lawful purpose out of his own funds to aid or defeat any candidate or candidates or measures, he may do so either by making a contribution or by complying with all of the provisions of this chapter as if he were a campaign treasurer of a political committee.

(b) It shall be lawful for any individual to donate his own personal services and personal traveling expenses to aid or defeat any candidate or measure and such a donation shall not constitute a contribution or expenditure, as defined in Section 251.001 only so long as he either is not compensated or reimbursed for same.

(c) It shall be unlawful for any person to make any contribution or expenditure in the name of another or on behalf of another without revealing that fact in order that the proper disclosure may be made.

(d) Except as expressly permitted by Subsections (a), (b), and (e) of this Section it shall be unlawful for any person, other than a candidate, his campaign treasurer, or assistant campaign treasurer, or the campaign treasurer of a political committee, to make or authorize any campaign expenditure. Except as provided in Subsections (a), (b), and (e) of this Section, campaign expenditures must be made by the candidate, campaign treasurer, or assistant treasurer, or the campaign treasurer of a political committee.

(e)(1) It shall be lawful for a corporation or a labor organization to expend its own funds for the purpose of aiding or defeating a measure by making a contribution to a political committee that supports or opposes measures exclusively.

(2) It shall be lawful for a corporation or labor organization, not acting in concert with any other person, to make direct expenditures from its own funds for the purpose of aiding or defeating a measure by complying with this Section as if the corporation or labor organization were an individual.

APPENDIX T

ARGUMENTS FOR PROOF OF CONSPIRACY AND PERJURY

A- Letter from Attorney Robert Axelrad to Bruce LaBoon
TCB - August 27, 1987 Page 3- Paragraph 4

The limited partners have recently offered to form another entity, whereby they would present to the Receiver an offer to purchase the downtown property for the sum of $745,000.00, consisting of $320,000.00 cash and a note for $425,000.00, payable monthly, amortized over 10 years, but with a five year balloon. The note would bear interest at floating prime, and would be personally guaranteed by each of the limited partners. If approved by the Courts, the Bank would release these guarantors from liability on the $825,000.00 note and proceed to judgment against Schwager for the deficiency. Whether such a deficiency could be satisfied by the collaterally assigned note is under consideration.

B- Appellants Opening Brief - March 18,1991 Page 25

Both the limited partners and TCB had previously denied any discussions of meetings for the purpose of allowing the bank to restructure the loan so as to cut off Schwager's interest in the Partnership and, thereafter, sell the land back to the Limited Partners after applying Schwager's Jow note (the sole family asset) on TCB's previous indebtedness. Schwager's counsel offered a letter which clearly impeached these denials. (Plaintiff's Exhibit 124). Schwager was a third party to the settlement proposal outlined in the letter; therefore, the so-called settlement rule did not apply.

C - Appellant's Response Brief - February 13, 1992
Pages 24, 25, 26, 28 and 29.

The excluded documents would have proved the perjury of Edward Stringer, Charles Best and Limiteds. Hearing May 23, 1988, pp. 267-68, 353, S.F. 225, 292, Documents Def. Exh. 415, 48-66 (App. Br. p. 22, ¶ 1). Attorney-client privilege was waived when the contents of this letter were discussed with Mr. Stringer at the hearing 5/23/89 pp. 267-68, 353, when he and Mr. Fallas denied any knowledge about this type of arrangement and thus committed perjury. If judge Wittig had reviewed this document, he knew or should have known it proved among other things the perjury of Mr. Stringer and Mr. Fallas at the May 23, 1988 Hearings.

As previously shown, the Stringer memo dated 8/7/87 was the basis for the Axelrad Letter 8/27/87. This memo as well as the adverse loan documents proved the common scheme and perjury of Ed. Stringer and Charles Best and the Limiteds. *See* S.F. 230-236, 244-245, 246-258; 11/21/89, pp. 76-79, 133-139. Def. Exh. 57 shows in the action and timetable portion (p. 3), the same deal to defraud Schwager Parties as the Axelrad Letter (Def. Exh. 124) and Stringer memo (Def. Exh. 55). The absolute proof of the scheme is shown in Def. Exh. 59 action and timetable portion (p. 3) when they change the deal to eliminate the Limiteds obtaining property and eliminate the note to the Limiteds for $425,000.00. The reason for this change was Mr. Schwager's receiving the Axelrad letter (Def. Exh. 124) on *Sept. 4, 1987.* (S.F. 11/21/89, p. 73).

APPENDIX U

CONSTITUTIONS AND STATUTES

United States Constitution

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Constitution

Art. 1, § 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive

separate public emoluments, or privileges, but in consideration of public services.

Art. 1, § 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Art. 1, § 14. Double jeopardy

Sec. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

Art. 1, § 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land.

Art. 5, § 8. Jurisdiction of District Court

Sec. 8. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

§ 51.014. Appeal From Interlocutory Order

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65; or

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is in an officer or employee of the state or a political subdivision of the state.

APPENDIX V

ORDER STRIKING 42 OF 44 POINTS OF ERROR

In The
Court of Appeals
For The
First District of Texas

NO. 01-90-00270-CV

BRUCE B. SCHWAGER, BETTE SCHWAGER, B.B.M.M., LTD., AND B.M. BAYOU CORPORATION, Appellants

V.

TEXAS COMMERCE BANK, N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE, HARVEY RESNICK AND WILLIAM CRAMER
Appellees

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 87-14551

ORDER

Based on a jury verdict, the trial court granted judgment fo Texas Commerce Bank (TCB), in its suit on a note agains appellants, Bruce Schwager (Schwager) and B.B.M.M., Ltd., an against appellees, Fred Fallas, Meyer Fallas, Malcolm Marco

Harvey Resnick and William Cramer (the limited partners), and on its cause of action against Schwager for conversion. The judgment also awarded the limited partners damages on their cross-claims against Schwager for breach of contract and breach of fiduciary duty. The judgment ordered that appellants,[1] take nothing on their counterclaims against TCB and on their cross-claims against the limited partners. Schwager has appealed from this judgment.

This is a complex case involving multiple parties and multiple claims. The record consists of 10 volumes of transcript totalling approximately 2,200 pages, 34 volumes of statement of facts totalling approximately 4,500 pages, and 14 volumes of exhibits totalling hundreds of pages.

On January 28, 1991, Schwager filed a 99-page brief and a motion to file a brief in excess of 50 pages. On February 14, 1991, we denied the motion and ordered him to file a 50-page brief. TEX. R. APP. P. 74(h). On March 14, 1991, we allowed Schwager to file a 60-page brief. On May 16, 1991, we struck Schwager's second brief due to inadequate citations to the record, and ordered him to rebrief. On June 17, 1991, Schwager filed his third brief containing 44 points of error. On July 12, 1991, one of the appellees moved to strike Schwager's third brief due to, among other things, inadequate citations to the record. We denied this motion on August 8, 1991.

We now rule that all the points of error raised in Schwager's third brief, except points one and four, are deemed waived for Schwager's failure to comply with TEX. R. APP. P. 74, despite having had three opportunities to do so. *See Inpetco v. Texas Am. Bank*, 729 S.W.2d 300 (Tex. 1987); *Henry S. Miller Management Corp. v. Houston State Assoc.*, 792 S.W.2d 128, 133-35 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (op. on reh'g), TEX. R. APP. P. 83. Therefore, we strike all the points of error in

---

[1]Except where otherwise indicated, the appellants will be collectively referred to as Schwager.

Schwager's third brief, except points one and four, and order that part of Schwager's appeal be dismissed.

Schwager's second point of error asserts the limited partners' claims against Schwager are barred by res judicata, collateral estoppel, "and/or" issue preclusion. Schwager's fifth point of error asserts the limited partners' claims were barred by the doctrine of compulsory counterclaim. Schwager's eighth point of error asserts TCB had no standing to file suit for collection of the entire balance on the note, and the limited partners had no standing to sue for breach of contract. Schwager's tenth point of error asserts the trial court erred in allowing the limited partners and TCB, collectively, more jury strikes than those allowed Schwager and in allowing multiple and repetitive cross-examination of Schwager. Schwager's twenty-first point of error asserts the trial court "held impermissible bias and prejudice against [Schwager]," therefore, Schwager was deprived of a fair trial and the trial court should have recused itself under "rule 18b(2)." Schwager's thirtieth point of error asserts the trial court abused its desertion by holding Schwager and his counsel in contempt during trial creating a conflict of interest which deprived Schwager of effective assistance of counsel and a fair trial. These points do not set out where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35, TEX. R. APP. P. 52(a), 74(d).

We strike points two, five, eight, 10, 21 and 30.

Schwager's third point of error asserts the trial court erred in striking Bette Schwager as a party. Schwager's eleventh point of error asserts that prejudicial and incurable oral argument entitles him to a reversal. Schwager's twenty-ninth point of error asserts the trial court abused its discretion in allowing the jury to speculate concerning the effect of a final judgment in a related case resulting in the rendition of an improper verdict in this case. These points cite no authority. *See Henry S. Miller Management*, 792 S.W.2d at 131; TEX. R. APP. P. 74(f). Also, in point of error 29, Schwager seems to be complaining about the improper admission of evidence without discussing the substance of the evidence, or pointing out

where in the record he objected to the evidence and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35; TEX. R. APP. P. 74(d), (f).

We strike points of error three, 11 and 29.

Schwager's sixth point of error asserts the trial court erred in granting TCB's motion for summary judgment. Schwager claims TCB's summary judgment proof was legally insufficient. Without discussing TCB's summary judgment proof, Schwager asserts:

> TCB's summary judgment proof, when taken as a whole, fails to establish, as a matter of law, that TCB can not be held liable for the independent tort of duress and fraud or forgery. (TR 809-846)

This point presents nothing for review because it does not contain "a fair, condensed statement of the facts pertinent" to the point, as required by rule TEX. R. APP. P. 74(f).

We strike point of error six.

Schwager's seventh point of error asserts the trial court:

> erred in failing to submit a special issue on the breach of the duty of good faith and fair dealing, wrongful acceleration, forgery, conspiracy, breach of contract, and mental anguish, pain and suffering. These issues were tried by consent. Directed verdict should not have been granted on Schwager's wrongful acceleration and forgery claims.

Schwager cites to the record where the trial court refused his requested charge and where the trial court granted a directed verdict. Schwager argues evidence was presented to raise all of the foregoing issues, citing to the record in support of this assertion as follows:

> (Breach of Good faith: Vol. 1 pp. 39, 40, 42, 79, 80, 84, 97, 113-137, 140-41, 146-152, 154-156, 165-173; Vol. 2

pp. 281-83, 287-88, 292, 317-331, 345, 358-62, 366-394; Vol. 3 pp. 404-418, 422, 433, 445, 453, 454, 461, 464-466, 468-69, 476-484, 490-495-98, 499-504, 600; Vol. 8 p. 1492; Vol. 9 pp. 1679-81, 1688-92; Nov. 21 pp. 63, 67-79, 153, 154, 203, 204, 221, 234, 238-39, 247, 248, 249, 252, 253; Nov. 22 pp. 107-68; Wrongful Acceleration and Breach of Contract: Vol. 1 pp. 39, 41, 48, 112, 142-147, 174-177; Vol. 3 pp. 419-422, 446, 448-49, 470-72; Vol. 4 pp. 673-74, 799; Vol. p. 925; Vol. 6 p. 1000; Vol. 9 pp. 1548-1551, 1588, 1592-1597; Nov. 20 pp. 110, 112, 114, 117; Nov. 21 pp. 243, 244, 249-55; Nov. 22 p. 130; Forgery: Vol. 4 pp. 752-54, 759-770; Vol. 8 pp. 1494-1542; Vol. 9 pp. 1580-1601, 1605-1617, 1618-1630, 1695-92; Conspiracy: Vol. 1 pp. 37, 39, 40, 42, 45, 47-48, 50, 54, 97, 114, 115, 137, 140-41, 146-52, 162-165; Vol. 2 pp. 68-94, 269-70, 288-89, 292, 295-97, 318-331, 348-358, 366-68, 383; Vol. 3 pp. 404-418, 422, 423-429, 433, 445, 447-48, 458-461, 476-484-89, 490-95-96-98, 499-504, 521-523, 585, 597-600, 600-611; Vol. 4 pp. 641-42, 654-55, 674, 684-94, 698; Vol. 5 pp. 898-907, 924-36; Vol. 6 pp. 1006, 1067-68, 1163-64; Vol. 7 p. 1310; Vol. 8 p. 1492; Vol. 9 pp. 1582-85; Nov. 20 pp. 26, 55, 63, 86, 87-101, 102-110; Nov. 21 pp. 38-39, 67-79, 88-93, 95, 98, 134-140, 154-56, 225-26; Nov. 22 pp. 104-05, 107-08).

Schwager then makes approximately six statements describing evidence admitted at trial, but cites to the statement of facts for only one.

This point presents nothing for review because Schwager's arguments do not "include a fair, condensed statement of the facts pertinent to [this point], with references to the pages in the record" where these facts may be found as required by rule 74(f). Moreover, this point complains of the trial court's refusal to submit various questions to the jury without setting out such part of the requested charge the trial court refused, as required by TEX. R. APP. P. 74(f).

We strike point of error seven.

Schwager's ninth point of error asserts, "[T]he trial court erred in denying [Schwager's] claim of usury and no mutuality of contracts against [TCB] as the bank's charges on the indebtedness were usurious and no mutuality of remedies." Schwager's twenty-fifth point of error asserts the trial court entered an improper judgment. These points do not set out where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management*, 792 S.W.2d at 133-35, TEX. R. APP. P. 52(a), 74(d). Also, the factual assertions in these points are not supported by references to the record. TEX. R. APP. P. 74(f).

We strike points of error nine and 25.

Schwager's twelfth point of error asserts the trial court abused its discretion in refusing to admit evidence of a proposed compromise and settlement agreement between the limited partners and TCB resulting in an improper verdict and improper use of abandoned pleadings.

This point does not describe the substance of the evidence sought to be admitted, as required by TEX. R. APP. P. 74(f). Schwager specifically complains of the exclusion of defendant's exhibit 124, citing to pages 226 to 258 in the statement of facts. Schwager cites to no portion of the record where he sought to introduce the evidence and obtained an adverse ruling from the trial court, as required by TEX. R. APP. P. 74(d). *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35. Pages 226 to 258 in the statement of facts contain no mention, and no refusal to admit defendant's exhibit 124.

We strike point of error 12.

Schwager's thirteenth point of error asserts the trial court abused its discretion in striking Schwager's claims from punitive damages and attorney's fees because of Schwager's counsel's failure to timely file a pretrial order.

Schwager's discussion of this point begins by stating:

> [Schwager's] Petition for Writ of Mandamus (No. 01-89-0913-CV) is incorporated by reference herein for all intents and purposes. (See Motion filed 2-1-91)

This does not comply with TEX. R. APP. P. 74(f) requiring a "fair, condensed statement of the facts pertinent" to the point, and a discussion of the facts and authorities relied upon to maintain the point. The point contains no discussion of the facts surrounding the trial court's striking of the foregoing claims for failure to timely file a pretrial order.

We strike point of error 13.

Schwager's fourteenth point of error asserts the trial court abused its discretion in ruling that Schwager could not present evidence of the limited partners' financial status to the jury. Schwager's sixteenth point of error asserts the trial court abused its discretion in refusing to admit the portions of the tape transcript of 1985 offered by Schwager under the doctrine of completeness.

These points do not state where in the record Schwager offered the evidence and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(d). Also, the points contain no discussion of the substance of the excluded evidence. TEX. R. APP. P. 74(f).

We strike points of error 14 and 16.

Schwager's twentieth point of error asserts the trial court abused its discretion by denying Schwager his right to impeach TCB and the limited partners with "Axelrad letter, Stringer memo, and bank's adverse loan review papers." Schwager's twenty-seventh point of error asserts the trial court abused its discretion in refusing to allow Schwager to prove the factual circumstances surrounding the temporary injunction entered in the cause against TCB.

The points contain no discussion of the substance of the excluded evidence, as required by TEX. R. APP. P. 74(f).

We strike points of error 20 and 27.

Schwager's fifteenth point of error asserts the trial court abused its discretion in admitting evidence proffered by TCB and the limited partners of Schwager's alleged breaches and misconduct which occurred prior to October 14, 1986. Schwager's seventeenth point of error asserts the trial court abused its discretion in allowing accounting testimony which violated the preclusive effects of a prior judgment. Schwager's eighteenth point of error asserts the trial court abused its discretion in allowing an expert witness to invade the province of the court and testify concerning the applicable law of the disputed transactions. Schwager's forty-fourth point of error asserts the trial court erred in admitting testimony that Schwager converted parking lot rentals.

These points do not set out where in the record he objected to the foregoing evidence and obtained and adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(d). Also, the points contain no discussion of the substance of the objectionable evidence. TEX. R. APP. P. 74(f). The brief also cites no authority in support of points 15 and 17. TEX. R. APP. P. 74(f). Points 17 and 18 cite more than 150 pages of the statement of facts, some in 50 and 65 page segments, in 1 1/2 pages of total text, without identifying specifically the objectionable testimony.

We strike points 15, 17, 18, and 44.

Schwager's nineteenth point of error asserts the trial court abused its discretion in refusing to allow Schwager to elicit testimony from Judge Michael O'Brien "to refute testimony of witnesses and in allowing hearsay testimony of receiver."

With respect to the excluded testimony, the point does not discuss the substance of this testimony with references to the record. TEX. R. APP. P. 74(f). With respect to the testimony the trial court admitted, the point does not discuss the substance of this testimony, and it does not set out where in the record Schwager objected to the testimony and obtained an adverse ruling. *Henry*

S. Miller Management Corp., 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, the brief cites no authority in support of this point. TEX. R. APP. P. 74(f).

We strike point of error 19.

Schwager's twenty-sixth point of error asserts the trial court abused its discretion in admitting evidence that Schwager violated the partnership agreement and bank documents by changing the terms of the lease between B.M. Bayou Corporation and B.B.M.M., Ltd. Schwager's twenty-eighth point of error asserts the trial court abused its discretion in refusing to admit Schwager's testimony concerning the factual circumstances surrounding the closing of the restaurant operated by B.M. Bayou Corporation "and/or" B.B.M.M., Ltd., and the damages suffered by the loss of the "2500/mo." payment. Schwager's forty-third point of error asserts the trial court erred in allowing the admission of parol evidence to vary the terms of the subscription and partnership agreements.

These points to dot set out the substance of the objectionable evidence admitted by the trial court. TEX. R. APP. P. 74(f). Also, many of the factual assertions in these points are not supported with references to the record. *Id.* The brief also cites no authority in support of points 28 and 43. *Id.*

We strike points of error, 26, 28 and 43.

Schwager's twenty-second point of error asserts that cumulative error in the pretrial and trial proceedings was harmful and requires a new trial. This point is unsupported by any factual discussion. TEX. R. APP. P. 74(f).

We strike point of error 22.

Schwager's twenty-third point of error asserts the trial court abused its discretion by refusing to allow Schwager to amend his claims "to include conspiracy against TCB. (No surprise and tried by consent)."

This point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, Schwager claims the issue of conspiracy was tried by consent without discussing the evidence that allegedly raised the conspiracy issue. TEX. R. APP. P. 74(f).

We strike point of error 23.

Schwager's twenty-fourth point of error asserts the trial court abused its discretion in denying Schwager's motion for a new trial. In support of this point, Schwager incorporates by reference the arguments contained in his motion for new trial. This does not comply with TEX. R. APP. P. 74(f). Also, this point is neither argued nor supported by authority. *Id.*

We strike point of error 24.

Schwager's thirty-first through thirty-fourth points of error assert the jury's answer to various questions are against the great weight and preponderance of the evidence. The points do not state where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f); *see also* TEX. R. CIV. P. 324(b)(3). The brief also cites no authority in support of these points. TEX. R. APP. P. 74(f).

We strike points of error 31 through 34.

Schwager's thirty-fifth through fortieth points of error assert there is no evidence to support the jury's answer to various questions, and the evidence was insufficient to support the submission of these questions to the jury.

The points do not state where in the record Schwager presented these complaints to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f); *see also Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988). Also, these points

complain about various aspects of the charge without setting out those parts of the charge, as required by TEX. R. APP. P. 74(f).

We strike points of error 35 through 40.

Schwager's forty-first point of error asserts the jury's answer to two of the questions in the charge constitutes an impermissible attack on the trial court's final judgment in a related case. The point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f). Also, the point cites no authority. TEX. R. APP. P. 74(f).

We strike point of error 41.

Schwager's forty-second point of error states the trial court erred in refusing to submit special issues on Schwager's theory of the case or the issues supported by Schwager's pleadings and tried by consent. Although Schwager cites to the record where he submitted his requested charge, which the trial court refused, the point does not set out the part of his requested charge that the trial court refused, as required by TEX. R. APP. P. 74(f). Also, the point contains no discussion of evidence supporting the requested charge. TEX. R. APP. P. 74(f).

Schwager also complains the trial court refused to allow him to amend his pleadings at trial to conform to evidence of a conspiracy between TCB and others. The point does not state where in the record Schwager presented this complaint to the trial court and obtained an adverse ruling. *Henry S. Miller Management Corp.*, 792 S.W.2d at 133-35; TEX. R. APP. P. 52(a), 74(f).

We strike point of error 42.

Based on the foregoing discussion, we strike all of Schwager's points of error, except points one and four, and order this portion of the appeal dismissed.

It is so **ORDERED**.

PER CURIAM

Panel consists of Justices Bass, Cohen and Wilson.

Do not publish. TEX. R. APP. P. 90.

Order entered
True Copy Attest:

Feb.-24-1992
Kathryn Cox
Clerk of Court

APPENDIX W

JUDGMENT CASE #86-07376

NO. 86-07376

BRUCE B. SCHWAGER, ET AL	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, T E X A S
HARVEY RESNICK, ET AL	§	125TH JUDICIAL DISTRICT

JUDGMENT

On the 14th day of July, 1986, the above-entitled and numbered cause came on for trial. Plaintiffs, Bruce Schwager and B. B. M. M., Ltd. (hereinafter sometimes collectively referred to as "Plaintiffs") appeared by and through their respective representatives and counsel. Defendants, Harvey Resnick, William Cramer, Malcolm Marcoe, Meyer Fallas and Fred Fallas (hereinafter sometimes collectively referred to as "Defendants") appeared by and through their representatives and counsel.

A jury trial having been waived and all issues of fact and law having been submitted to the Court, and the Court having considered the evidence, issues the following judgment:

1. It is ORDERED that the request of Defendants for a dissolution of B. B. M. M., Ltd. is denied.

2. Because the Court finds that it would be in the best interests of all parties that a receiver be appointed to effect an orderly and satisfactory disposition of the property of B. B. M. M., Ltd., it is ORDERED that Dale Everett is hereby appointed as receiver for the property owned by B. B. M. M., Ltd. including the real property that is situated at 110-112 Travis

Street, Houston, Harris County, Texas described by metes and bounds on the attached Exhibit "A".

3. It is further ORDERED that Mr. Everett shall post with the Clerk of the Court a good and sufficient bond, to be approved by such clerk, in the amount of $1,000 payable to Plaintiffs and Defendants, conditioned as provided by law.

4. It is further ORDERED that Mr. Everett shall seek an orderly and satisfactory sale of the property owned by B. B. M. M., Ltd. and attempt to obtain fair market value for the property owned by B. B. M. M., Ltd.

5. It is further ORDERED that Bruce Schwager may continue to operate the restaurant presently operated in the property owned by B. B. M. M., Ltd.

6. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Malcolm Marcoe so long as Defendant Malcolm Marcoe makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

7. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant William Cramer so long as Defendant William Cramer makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day each month hereafter, beginning on September 15, 1986.

8. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Meyer Fallas so long as Defendant Meyer Fallas makes a capital contribution to B. B. M. M., Ltd. in the amount of $3,500.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

9. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Fred Fallas so long as Defendant Fred Fallas makes a capital contribution to B. B. M. M., Ltd. in the amount of $1,750.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

10. It is further ORDERED that Plaintiffs shall refrain from selling the limited partnership interests of Defendant Harvey Resnick so long as Defendant Harvey Resnick makes a capital contribution to B. B. M. M., Ltd. in the amount of $1,750.00 (or such amount as the Court may fix hereafter) on the 15th day of each month hereafter, beginning on September 15, 1986.

11. It is further ORDERED that Bruce Schwager, as General Partner of B. B. M. M., Ltd. shall apply the capital contributions of Defendants to the following expenses of B. B. M. M.. Ltd:

a. the monthly installment payment due on that certain promissory note dated December 18, 1984 executed by B. B. M. M., Ltd., payable to Texas Commerce Bank, Chemical;
b. real estate taxes;
c. premiums for casualty, liability and related insurance coverage;
d. maintenance and repairs incurred in the ordinary course of business; and
e. utilities.

12. It is further ORDERED that Bruce Schwager as General Partner of B. B. M. M., Ltd. shall render a monthly accounting of the disposition of all funds contributed to B. B. M. M., Ltd. by the Defendants hereafter, such accounting to be furnished to the Receiver, the Court and to Defendants by the first day of the month following the month in which contributions are made.

13. It is further ORDERED that Bruce Schwager shall render a monthly accounting as to the operation of BM Bayou Corporation and the restaurant known as Barton's Landing, such accounting to be made by the tenth (10th) day of each month commencing October 10, 1986, and such accounting to be furnished to the Receiver, the Court and the Defendants by the tenth day of each month commencing October 10, 1986.

14. It is further ORDERED that the Court will consider requests of the Plaintiffs and Defendants to enter into any agreements with third parties which would obviate the need for continuation of the receivership or the ultimate forced sale of the property of B. B. M. M., Ltd.

15. It is further ORDERED that all costs incurred herein are taxed one-half to Bruce Schwager and one-half to Defendants.

Signed this 14th day of October, 19 86.

Michael O'Brien
JUDGE PRESIDING

APPROVED:

JOHNSON & ARTIZ

By:_____
J. W. (Don) Johnson
State Bar #10736000
2600 Niels Esperson Bldg.
Houston, Texas 77002
(713) 224-7083

ATTORNEY FOR PLAINTIFFS AND COUNTER-DEFENDANTS BRUCE B. SCHWAGER & B. B. M. M., LTD.

APPROVED AS TO FORM ONLY:

HIRSCH & WESTHEIMER, P.C.

By:_____
Joseph S. Cohen
State Bar #04508370
25th Floor
RepublicBank Center
Houston, Texas 77002
(713) 223-5181

ATTORNEYS FOR DEFENDANTS AND COUNTER-PLAINTIFFS HARVEY RESNICK, MALCOLM MARCOE, MEYER FALLAS, FRED FALLAS AND WILLIAM CRAMER

86082701
019JSC

APPENDIX X

POLITICAL CONTRIBUTIONS TO THE SUPREME COURT OF TEXAS

An Appearance of Impropriety

David F. Bragg
Principle Author

Contributing Authors:

Tom Smith, Public Citizen
Karl Bayer, Texas Consumer Association
Charlotte Flynn, Gray Panthers
Dee Simpson, American Federation of State,
County & Municipal Employees

September 2, 1992

EXCERPT FROM PAGE 6 OF REPORT

The Supreme Court of Texas is the highest appellate Court in Texas. Not only does it judge cases which become the rule of law for every other civil court in the State, it also enacts rules which govern the behavior and ethical standards of lawyers. Because of its ability to profoundly affect the lives of each member of our society, the nine justices who are elected to the Court hold a sacred trust. To insure that the Court's decisions are based only on law and the facts of each case rather than current public opinion, the Court is allowed to conduct its deliberations in secret. No other branch of government is granted this right. Because the public is excluded from Supreme Court deliberations, the public has a right to demand that no other outside influence bear on the Court's decisions. And, because of the secrecy which shrouds the deliberations, like Caesar's wife, each member of the Court must studiously avoid even the appearance of impropriety. Otherwise, public trust, which is essential to the operation of the Court, is in danger of being lost. When any single source makes large campaign contributions to candidates for the Supreme Court, public suspicion naturally is aroused. The public's reaction is not unique to the Supreme Court; it occurs at every level of government, whenever those who make laws or enforce them receive financial benefits from those who are affected by the decisions. However, when the secrecy under which the Court must operate is injected into the mix along with the enormous power of the Court, significant financial contributions by special interest become even more troubling. The unfortunate reality, however, is that no one can get elected to the Supreme Court without a substantial campaign war chest. Supreme Court campaigns are very expensive. In the 1988-1990 elections, as illustrated in **Table 3,** more than $11 million was spent by justices who were successful in their campaigns.

EXCERPT FROM PAGE 13 OF REPORT

Bundling paves the way for voter deception. If the individual contributions of the members of a law firm are not added together, it is possible to make the misleading claim that a candidate has imposed a "cap" on contributions. When the individual contributions of members of large firms are added together, however, the claim becomes a sham that misleads voters.

EXCERPT FROM PAGE 14 OF REPORT

TABLES 6, 7 AND 8

ATTORNEYS WITH BAKER & BOTTS, A DEFENSE FIRM, CONTRIBUTED MORE MONEY TO SUCCESSFUL SUPREME COURT CANDIDATES THAN ANY OTHER SINGLE GROUP OF LAWYERS IN THE STATE. ATTORNEYS WITH VINSON & ELKINS, ANOTHER DEFENSE FIRM, CONTRIBUTED THE SECOND HIGHEST AMOUNT.

Top 50 Law Firm Contributors
1988 thru 1990

Firm Name	Totals
Baker & Botts	$197,208.57
Vinson & Elkins	$158,212.00
Bracewell & Patterson	$97,627.00
Law Offices of Frank Branson	$96,985.62
Helm, Pletcher, Hogan, Bowen & Saunders	$95,725.00
Fulbright & Jaworski	$80,265.00
Law Office of Pat Maloney	$72,550.00
Baldwin & Baldwin	$66,500.00
Wellborn, Houston, Adkinson, Mann & Sadle	$63,055.60
Locke, Purnell, Rain & Harrell	$62,484.00
Fisher, Gallagher & Lewis	$60,750.00
Baron & Budd	$55,635.00
Krist, Gunn, Weller, Neumann & Morrison	$55,100.00
Liddell, Sapp, Zivley, Hill & Laboon	$53,570.00
Umphrey, Swearingen & Eddins	$52,600.00
Haynes & Boone	$49,600.00
Strasburger & Price	$46,970.00
Mithof & Jacks	$45,025.00
Thompson & Knight	$44,430.00
Groce, Locke & Hebdon	$44,285.00
Jones, Jones, Curry, & Roth	$44,000.00
Andrews & Kurth	$43,700.00
Reaud, Morgan & Quinn	$43,350.00
Kelly, Appleman, Hart & Hallman	$41,115.00
Glenn Vickery & Associates	$40,620.66
Jamail & Kolius	$38,550.00
Perry & Haas	$38,500.00
Edwards & Terry	$38,260.00
Tinsman & Houser	$38,250.00
Stubbeman, McRae, Sealy, Laughlin & Browder	$38,012.00
Jones, Day, Reavis & Pogue	$37,750.00
Cantey & Hanger	$37,050.00
Hughes & Luce	$36,825.00
Law Offices of Stanley W. Crawford	$36,500.00

Akin, Gump, Strauss, Hauer & Feld	$36,400.00
Ernest Cannon & Associates	$35,500.00
Graves, Dougherty, Hearon & Moody	$34,062.47
Law Offices of Gilbert T. Adams. Jr.	$33,840.74

TABLE 6

APPENDIX Y
OPINION OF FIRST COURT OF APPEALS AFFIRMING JUDGMENT

No. 01-90-00270-CV

In The
Court of Appeals
For The
First District of Texas

BRUCE B.SCHWAGER, BETTE SCHWAGER, B.B.M.M., AND B.M. BAYOU CORPORATION, Appellants
vs.
TEXAS COMMERCE BANK, N.A., CHARLES BEST, FRED FALLAS, MEYER FALLAS, MALCOLM MARCOE HARVEY RESNICK, AND WILLIAM CRAMER,
Appellees
On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 87-14551

OPINION

This is an appeal from a judgment based on a jury verdict. We affirm. On December 8, 1989, the trial court signed a judgment in favor of Texas Commerce Bank (TCB) on its note claim against appellants, Bruce Schwager (Schwager) and B.B.M.M. Ltd., and appellees, Fred Fallas, Meyer Fallas, Malcolm Marcoe, Harvey Resnick, and William Cramer (the limited partners), and on its conversion claim against Schwager. The judgment also awarded the limited partners damages on their cross-claims against Schwager for breach of contract and breach of fiduciary duty. The trial court's judgment ordered that Schwager, B.B.M.M., and the other appellants, Bette Schwager and B.M. Bayou Corporation (B.M. Bayou),[1] take nothing on their counterclaims against TCB and on their cross-claims against the limited partners.

Facts

In January 1984, Schwager and the limited partners formed a limited partnership, B.B.M.M., Ltd. (the partnership), to buy land in downtown Houston to operate a restaurant. Schwager agreed to be the general partner, to manage the restaurant, and to account to the limited partners. The limited partners agreed to pay the partnership debts secured by partnership property. They expected the restaurant's income to cover the partnership debts.

The partnership financed the purchase with a loan from Interfirst Bank (Interfirst loan), which was secured by a lien on the property, an assignment of rentals, and the assignment of a note (the Jow note) payable to Schwager. The partnership leased the property to B.M. Bayou to operate the restaurant. Schwager was the sole director, president, and a 50% stockholder of B.M. Bayou, and the limited partners owned the rest of B.M. Bayou's stock.

The restaurant operated at a loss, and the limited partners had to pay the Interfirst loan. The relationship between Schwager and the limited partners began to sour.

In September 1984, TCB loaned the partnership $825,000. Schwager and the limited partners signed the note and personally guaranteed the loan. The limited partners pledged additional collateral for this loan, and Schwager pledged the Jow note. The TCB loan was also secured by a lien on the property. TCB believed the restaurant's income would cover its note. Approximately $700,000 was used to extinguish the Interfirst loan, and $125,000 was used for new working capital.

By March 1985, the working capital was exhausted and the restaurant continued to lose money. The limited partners had to make the payments to TCB to avoid a default, and their relationship with Schwager continued to deteriorate. Finally, the limited partners stopped making payments on the TCB loan.

---

[1] Except where otherwise indicated, the appellants will be collectively referred to as Schwager.

In February 1986, Schwager, on behalf of the partnership, sued (the 1986 suit) the limited partners, alleging they breached the partnership agreement by failing to make capital contributions to cover the restaurant's debts. The limited partners counterclaimed, alleging misconduct by Schwager in operating the restaurant, and sought damages for breach of fiduciary duty, return of capital contributions, dissolution, and an accounting.

The 1986 suit was tried without a jury on July 14, 1986 and the trial signed a judgment on October 14, 1986. This judgment denied the limited partners' request for dissolution, but appointed a receiver to sell the partnership property. The 1986 judgment also ordered Schwager to refrain from selling the limited partners' partnership interests so long as they made capital contributions as agreed in the partnership agreement. The 1986 judgment also provided that the trial court would consider requests from any parties to make agreements with third parties that would eliminate the need for a receivership and the sale of the property. The judgment did not adjudicate the limited partners' claims alleging breach of fiduciary duty by Schwager and requesting return of their capital contributions.

In late 1986, some of the limited partners approached TCB, seeking to refinance the loan. The limited partners and TCB agreed to do so, but Schwager refused. In January 1987, the limited partners again stopped paying the TCB loan. In March 1987, the limited partners approached TCB with a new refinancing proposal, but TCB rejected it. TCB subsequently accelerated the loan, but received no payments.

Trial Court Proceedings

In 1987, TCB sued (the 1987 suit) Schwager, the partnership, and the limited partners on the note, and sued Schwager for conversion of rentals. Schwager individually and on behalf of the partnership, his wife, Bette Schwager, and B.M. Bayou, filed counterclaims against TCB and cross-claims against the limited partners, alleging various theories of recovery.

The 1987 suit went to a jury trial on November 1989. The trial judge directed a verdict for TCB as plaintiff on its note claim

and for TCB as defendant on Schwager's claims of wrongful acceleration and breach of contract. The trial judge submitted no jury questions on any claims by Bette Schwager and B.M. Bayou.

The jury found against Schwager and the partnership on their claims against the limited partners for breach of the partnership agreement, breach of fiduciary duty, and tortious interference with contract. The jury found for TCB on its conversion claim against Schwager, and award TCB compensatory damages. The jury also found that Schwager's breach of fiduciary duty was "committed intentionally, maliciously, or with heedless and reckless disregard of the rights" of the limited partners, and awarded them punitive damages. The jury found that Schwager fraudulently induced the limited partners to enter the partnership agreement. On December 8, 1989, the trial judge signed a judgment (the 1989 judgment), based on the jury findings and the directed verdicts. This judgment is the subject of this appeal.

Preliminary Procedural Matters on Appeal

The appellate record consists of 10 volumes of transcript totaling approximately 2,200 pages, 34 volumes of statements of facts totaling approximately 4,500 pages, and 14 volumes of exhibits totaling hundreds of exhibits.

On January 28, 1991, Schwager filed a 99-page brief and a motion to file a brief in excess of 50 pages. On February 14, 1991, we denied the motion and ordered Schwager to file a 50-page brief. TEX. R. APP P. 74.(h). On March 14, 1991, we allowed Schwager to file a 60-page brief. On May 16, 1991, we struck Schwager's second brief due to inadequate citations to the record, and ordered him to rebrief. On June 17, 1991, Schwager filed this third brief, containing 44 points of error. On July 12, 1991, one of the appellees moved to strike Schwager's third brief due, among other things, to inadequate citations to the record. We denied this motion on August 8, 1991.

On February 24, 1992, we struck 42 of Schwager's 44 points of error because they did not meet the requirements of TEX R. APP P. 74. *See Inpetco v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987); *Henry S. Miller Management Corp. v. Houston State Associates*, 792 S.W.2d 128, 133-35 (Tex. App.--Houston

[1st Dist.] 1990, writ denied) (op. on reh'g); *see generally* Gunn, *Unsupported Points of Error on Appeal*, 32 So. Tex. L. Rev. 105 (1990). We held that only points of error one and four were properly briefed. Schwager has repeated moved to dismiss the appeal. These motions were taken with the case because they are also the subject of Schwager's first point of error. We will discuss the motions and the first point of error together.

Points of Error

Schwager's first point of error and his motions assert the trial court's 1989 judgment was granted without jurisdiction, and is, therefore, void.

The trial judge consolidated in 1986 and the 1987 suits under the cause number of the 1987 suit. Tex R. Civ P. 174(a). As stated, the 1986 judgment appointed a receiver to sell the partnership property. The 1989 judgment dissolved that receivership and awarded damages to TCB and to the limited partners. Schwager contends the 1989 judgment is void for lack of jurisdiction because it modified the 1986 judgment after it was final. An order appointing a receiver is interlocutory. *See* Tex Civ. Prac & Rem Code Ann § 51.014(1) (Vernon Supp. 1992) Therefore, the trial court had jurisdiction in the consolidated suit to dissolve the receivership. Otherwise, the receivership would be perpetual. Dissolving the receivership was not an improper modification of a final order. The 1986 judgment is not labeled a "final judgment," and it did not deny all relief not expressly granted. We hold the 1986 judgment was not final. It was "intrinsically interlocutory." *North East Indep. School Dist. v. Alldridge*, 400 S.W.2d 893, 897 (Tex. 1966).

In addition, that part of the 1989 judgment awarding the limited partners damages against Schwager was based on Schwager's conduct occurring after the trial in the 1986 suit. That trial was held on July 14, 1986. In the 1987 suit, the jury found that Schwager breached his fiduciary duty to the limited partners, as well as the partnership agreement, after August 11, 1986. The 1986 judgment did not adjudicate any of the various claims for damages. TCB was not a party in the 1986 suit. Therefore, the 1989 judgement did not "modify" the 1986 judgment.

The 1989 judgment is not void for lack of jurisdiction.Schwager's first point of error is overruled, and his motions to reverse the trial court's judgment and dismiss the appeal are denied. The fourth point of error asserts the trial court erroneously denied Schwager the right to open and close the evidence.

The trial court denied the Schwager parties' motion to realign the parties and designate them as plaintiffs. They argue they should have been designated "plaintiffs" in the 1987 suit, because they were plaintiffs in the 1986 suit, and the trial court erred in consolidating the two suits under the 1987 suit's cause number. They contend the trial court should have consolidated the suits under the cause number of the 1986 suit, in which they were plaintiffs. The Schwager parties do not contend they objected to the consolidation, nor do they cite to the record where they objected to the consolidation. Nothing is presented for review regarding any error in the consolidation. *See* Tex R. App P. 52(a), 74(f); *State Farm Mut. Automobile Ins. Co. v. Cowley,* 468 S.W.2d 353, 354, (Tex. 1971). Therefore, they have waived any error caused by an improper consolidation.

Moreover, TCB was a plaintiff in the 1987 suit. Its note claim and its conversion of rentals claim were tried before the jury. We find no error. *See* Tex R. Civ P. 266.

Schwager's fourth point of error is overruled.

The judgment is affirmed.

/s/Murry B. Cohen
Murry B. Cohen
Justice

Justices Bass and Wilson also sitting.
Publish. Tex R. App P 90.

Judgment rendered and opinion delivered
True Copy Attest:

3/12/92

Kathryn Cox
Clerk of Court

APPENDIX Z

Houston Chronicle
Sunday, Oct. 18, 1992

There's better way to finance judicial races that the way we do in Texas.

By Thomas R. Phillips *Phillips is chief justice of the Texas Supreme Court.*

Texans want and deserve judges who are fair, impartial and free of any suspicion that campaign contributions might influence their decisions. Every election, however, questions of judicial integrity are raised anew as judges enter the political world, raising and spending money in an effort to keep their jobs. Not surprisingly, most of these contributions come from those with a direct interest in the decisions of the courts — lawyers and, to a lesser extent, litigants. During this process, most candidates, contributors and citizens join Texas newspapers in asking: Isn't there a better way? Surely there is. Texas is currently the only state in the nation that does not place some limits on judicial campaign fund-raising, either by size of contribution, time and manner of solicitation of type of expenditure. If we are to continue to the popular election of judges, we must pass laws that help ensure public confidence in our judicial system. Although I believe that real abuses, by either judges or donors, are comparatively rare, the absence of meaningful campaign finance reform casts suspicion on our entire legal system.

Fortunately, the Legislature recognized this problem. Last year, it directed the newly formed Texas Ethics Commission to study judicial campaign finance and disclosure. The commission is conducting a series of public hearings across the state and will complete its report by Jan. 1.

At a minimum, I hope the commission will recommend these reforms:

Campaign contribution limits - The Legislature should cap individual and political action committee contributions at some reasonable limit.

That limit should be large enough to allow campaigns to raise enough to keep anyone from believing that a judge owes his or her position to the support of one individual or interest group.

Time limits - Judges (except for those holding statewide positions) are now permitted to raise campaign funds at any time, regardless of whether an election is impending or an opponent is likely. Fundraising is a necessary evil that should be strictly limited to election season. At other times, judges and those who appear before them should be free from any pressure which the political process might impose.

Shorter campaigns - Texas has a January filing deadline for a March primary for a November election for a January swearing-in, the longest campaign seasons in the nation. Judges, at least, should be permitted to spend more time deciding cases and less time attending fund-raisers.

Better financial disclosures - Judicial candidates should be required to report more information about their donors, to file their reports in more than one place to improve public access, and to prepare more frequent reports, particularly in the closing weeks of a campaign. In their annual financial statements, judges should be required to disclose any business investments or dealing with lawyers or litigants who appear before them. Of course there are other, more fundamental ways to address these problems and they should also be explored. Public financing of judicial campaigns or, better yet, changing the method of electing judges in the first place would reduce the potential for impropriety which burdens our current partisan election system. But public financing is unlikely to be embraced when the state is experiencing a revenue shortfall, and selection reform seems unlikely until the voters' rights challenge to our current system is resolved. Moreover, even those who support these reforms in principle have strong differences about the the details of their implementation. Meanwhile, we must not permit the best to be the enemy of the good. We should address the most serious problems of judicial campaign financing and reporting now, while continuing our long-term efforts toward a better overall system.

NO. 92-1265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONERS' REPLY/SUPPLEMENTAL BRIEF

BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030
(713) 796-2540

Pro Se

QUESTIONS PRESENTED

1. Were Petitioners denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed? Is the Texas Election Code Section 251.003 constitutional? Did the hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constitute lack of access to the court and an obstruction of justice?

2. Was Petitioner Bette R. Schwager deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 when she was not allowed to prosecute her claims and defend herself against the taking of her property?

3. Were Petitioners denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case when the court of appeals struck 43 of Appellants' 44 points of error for procedural defects?

4. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas? Were Petitioners denied the benefit of the final judgment entered in their favor on Oct. 14, 1986? (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Were

Petitioners denied their constitutional rights by the Texas courts assessing judgment against them without jurisdiction?

5. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court?

Note: *Schwager v. Texas Commerce Bank, N.A.*, 813 S.W.2d 225 (Tex. App.—Houston 1991) (per curiam). This case was stated in the U.S. Supreme Court Judicial Highlights November 1991, page ix West Supreme Court Reporter Vol. 112 November 1, 1991 No. 1.

PARTIES TO THE PROCEEDINGS

Pursuant to the Texas Rules of Appellate Procedure, Petitioners certify that the following is a complete list of the names of all parties:

PETITIONERS:

Bruce Schwager, Bette Schwager,
B.B.M.M., Ltd., and B.M. Bayou Corporation
2001 Holcombe
Houston, Texas 77030

RESPONDENTS:

Dr. Malcolm Marcoe
6630 DeMoss Suite A
Houston, Texas

Dr. Harvey Resnick
201 Oak Drive
Lake Jackson, Texas

Fred Fallas
9306 Cliffwood
Houston, Texas

Texas Commerce Bank, N.A.
712 Main
Houston, Texas

Charles Best
3803 Lost Oak
Spring, Texas

Meyer Fallas
9431 Denbury
Houston, Texas

William Cramer
9902 Balmforth
Houston, Texas

ATTORNEYS:

Bruce B. Schwager Bette R. Schwager *Pro Se*
2001 Holcombe, Apt. 806
Houston, Texas 77030

Mr. Robert Axelrad
1990 Post Oak Boulevard
14th Floor
Houston, TX 77056-3814

Texas Commerce Bank
Charles Best

Mr. Newton B. Schwartz
Schwartz, Berger & Valdez, P.C.
723 Main Street
Suite 325
Houston, TX 77002

Harvey Resnick

Mr. John Zavitsanos
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995

Texas Commerce Bank
Charles Best

Ms. Cynthia G. Farris
Baker & Botts
One Shell Plaza, 910 Louisiana
Houston, TX 77002-4995

Texas Commerce Bank
Charles Best

Mr. Neil S. Levin Suite 710 4828 Loop Central Drive Houston, TX 77081-2212	Fred Fallas, Meyer Fallas, Malcolm Marcoe, William Cramer
Mr. Joseph D. Cheavens Baker & Botts One Shell Plaza 910 Louisiana Houston, TX 77002-4995	Texas Commerce Bank Charles Best

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF AUTHORITIES ix

PRAYER 1

PRELIMINARY STATEMENT 2

PERTINENT CONSTITUTIONAL PROVISIONS 2

REASONS FOR GRANTING THE WRIT 3

1. Petitioners were denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed. The Texas Election Code Section 251.003 is unconstitutional. The hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constituted a lack of access to the court and an obstruction of justice 3

2. Petitioner Bette R. Schwager was deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 as

Page

she was not allowed to prosecute her claims and defend herself against the taking of her property 7

3. Petitioners were denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case as the court of appeals struck 43 of Appellants' 44 points of error for procedural defects 7

4. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas. Petitioners were denied the benefit of the final judgment entered in their favor on Oct. 14, 1986. (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Petitioners were denied their constitutional rights by the Texas courts assessing judgment against them without jurisdiction 7

5. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court 8

CONCLUSION 9

		Page
APPENDIX "A":	Letter to the Supreme Court of the United States, 3/16/93	A-1
APPENDIX "B":	Letter to the Supreme Court of the United States, 3/27/93	B-1
APPENDIX "C":	Comment on Proposed Order (*LULAC v. Clements*)	C-1
APPENDIX "D":	Baker & Botts' Letter to the Supreme Court of the United States, 2/23/93	D-1
APPENDIX "E":	Baker & Botts' Letter to the Supreme Court of the United States, 3/25/93	E-1
APPENDIX "F":	*Houston Chronicle* article, 3/27/93	F-1
APPENDIX "G":	U.S. Const. articles II & III	G-1
APPENDIX "H":	Reply Brief Texas Supreme Court	H-1
APPENDIX "I":	Chart of Funds - Campaigns	I-1
APPENDIX "J":	Judge Wood Memo	J-1
APPENDIX "K":	Verification	K-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 91 S. Ct. 6024, 95 L. Ed. 817 (1951) 8

King v. Finch, 428 F.2d 709 (5th Cir. 1970) 7

STATE CASES

State ex rel. Merriman v. Ball, 116 Tex. 527, 296 S.W. 1085 (1927) 8

DOCKETED CASES

League of United Latin Am. Citizens v. Clements, No. 90-8014, U.S. Appeals Ct., 5th Circuit (1993) 4, 10

CONSTITUTION

U.S. Constitution, Article II, sec. 2 . . . . . 2, 10

U.S. Constitution, Article III, sec. 1 . . . . . 2, 10

MISCELLANEOUS

Archibald Cox, *Courts and the Constitution* (1987) 10

Page

Allen Dershowitz, *The Best Defense* 27 (First Vintage Books Edition, May 1983) 8

I *Annals of Congress*, 439 (1789) 9

Sam Ervin Jr., *Separation of Powers: Judicial Independence*, 35 Law and Contem. Probl. 108, 121 (1970) 2

NO. 92-1265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONERS' REPLY/SUPPLEMENTAL BRIEF

PRAYER

Petitioners respectfully request that this Court review this reply prior to making a decision in this case. Rule 15 of the U.S. Supreme Court allows for the filing of a reply, and Petitioners pray that this Honorable Court review this Reply/Supplemental Brief prior to deciding this case on its merits. On March 27, 1993, this Court was notified that Schwagers would file a Reply/Supplemental Brief on or before April 2, 1993. (Appendices "A" & "B" of this document).

PRELIMINARY STATEMENT

To put the previous seven years of litigation in this case in proper perspective, the following quote of Theodore Roosevelt is offered:

> It is in the highest degree unwise to submit to any wrong without making an immediate and resolute effort to avenge it upon the wrongdoers, at no matter what the cost of risk and trouble. To submit tamely and weakly to theft or to any other injury is to invite almost certain repetition of the offense.

The Chief Justice of the Texas Supreme Court, Thomas R. Phillips, has clearly demonstrated his belief in the unconstitutionality of the method of selecting judges in Texas. His arguments alone are justification for this Court to rule for Petitioners. Examples are as follows: "Texans want and deserve judges who are fair, impartial and free of any suspicion that campaign contributions might influence their decision." (Appendix "Z" of Petition for Writ of Certiorari). Judge Phillips agreed with the Schwagers and admitted the validity of the Petition for Writ of Certiorari to the Supreme Court of Texas when he stated, "The proposed settlement does nothing to decrease the influence of partisan politics and big money in judicial elections." (Appendices "B" and "F" of this document).

The U.S. Constitution, Article II, sec. 2 and Article III sec. 1 (Appendix "G" of this document) mandate the need for an independent judiciary. "To my mind an independent judiciary is perhaps the most essential character of a free society." Sam Ervin Jr., *Separation of Powers: Judicial Independence*, 35 Law and Contem. Probl. 108, 121 (1970).

Again, Baker & Botts has made false statements and misrepresentations in this case as predicted by Schwagers in their Petition for Writ of Certiorari as shown by Baker & Botts' letter "Response Brief" to this Court on March 25, 1993. (Appendix "E" of this document). Petitioners adamantly reject their allegations and include as Appendix "H" of this document their Reply Brief filed in the Texas Supreme Court to support their objection to TCB's letter "Response Brief." Petitioners also objected to the sending and

content of Baker & Botts' letter. This Court is requested to review the letter (Appendix "B" of this document) sent to the Court by Petitioners for details. The combination of a large bank and a large defendants' law firm has so far made it impossible for Schwagers to obtain justice. As Thomas Jefferson stated, "Banking establishments are more dangerous than standing armies."

The request for an extension of time by Respondents (Appendix "D" of this document) clearly reenforced the need for this Court to approve Petitioners' Writ of Certiorari. The justification for their extension being the size of the record and the number of Schwager's Points of Error (44) proves beyond a doubt the unconstitutionality of the First Court of Appeals' ruling striking 43 of the points of error for procedural defects.

It was incredible that on March 25, 1993 TCB, through its attorney Baker & Botts, sent a letter "Response Brief" to this Court (Appendix "E" of this document) stating that it was not going to file a Response Brief. However, TCB attempted to respond to Petitioners' Writ of Certiorari in paragraph 2 of their letter. The conspiracy between TCB and the Limited Partners in this litigation is ongoing as evidenced by the fact that the Limiteds did not file a Respondents' Brief.

Petitioners respectfully request that this Court request and review the entire record of this case as allowed by *Rule 16* of the Supreme Court of the United States. Justice cannot be served until at least one court reviews the record in this case and makes a decision on the merits rather than campaign contributions and personal bias and prejudice.

REASONS FOR GRANTING WRIT

1. Petition for Writ of Certiorari to the Supreme Court of Texas Issue #1, page 11.

This issue is true and correct as written.

The U.S. Court of Appeals 5th Circuit ruled that the Texas Election Code was unconstitutional due to lack of minority representation in the election of judges in certain counties.

However, this was overturned when the full court decided to consider this question on 2/11/93. *League of United Latin Am. Citizens v. Clements*, No. 90-8014. Judge Sharolyn Woods, a defendant appellant in this case, also believes that the *real problem* in the election of judges in Texas was campaign contributions, not the lack of minority representation. This was stated in her memo to Harris County judges dated 2/12/93. (Appendix "J").

The Chief Justice of the Texas Supreme Court, Tom Phillips, also again stated that campaign contributions and the appearance of impropriety caused by this attempt to influence judges was a major problem in the selection of judges. Article in the *Austin Statesman* paper dated 3/10/93, p. A-17. The Attorney General of Texas in the same article demonstrated again that the real culprit in the selection of judges in Texas was campaign contributions. Expensive partisan elections tend to **CORRUPT THE JUDICIARY**. "AG is Texas Lawyer" *Houston Post* Editorial, 2/10/93, p. A-16.

On March 16, 1993, Bruce Schwager contacted the Texas Supreme Court to inquire about procedures used in reviewing Petitions for Writ of Error. He was told at that time that these procedures were *secret*. Prior to this call, Schwager was told that a yes vote by four (4) Justices was required before the Texas Supreme Court would accept a Writ for review. Secrecy of the Texas Supreme Court was discussed in Appendix "X" of the Petition for Writ of Certiorari. Clearly, this demonstrates that this would be impossible due to large contributions given to seven members of the Court. It should be noted in reviewing (Appendix "I" of this document) that the contribution breakdown is between Plaintiff's attorneys and Defendants' attorneys. Baker & Botts is an extremely large *defense* law firm. *How can an educated vote be made when the Texas Supreme Court operates in secret?*

It is impossible for a pro-se litigant or a solo practitioner who does not contribute to the judges of Texas at all levels to receive a fair and impartial hearing. This clearly deprived their clients of the right to Due Process as provided by the U.S. Constitution and the Texas Constitution. Due to the excessive campaign contributions to the supreme court and the district court, Baker & Botts should have declined representation of TCB in this case. There was

not any appearance of *proper* conduct committed in this case by the attorney and courts of Texas in this action.

As discussed in Appendix "X" of the Petition for Writ of Certiorari, "bundling" of campaign contributions to judges makes it extremely difficult to ascertain which law firms are contributing to certain judges. An investigation showed that Judge Don E. Wittig not only received thousands of dollars in campaign contributions from Baker & Botts and/or their attorneys, he was promised support for his appointment as a federal judge. These among other reasons were the basis for the outrageous conduct by Judge Wittig. Some outrageous acts are shown as follows:

1. Judge Wittig told court personnel he was out to get Schwager and his attorney, R. Dennis. Shortly thereafter, on June 23, 1989, Judge Wittig struck Schwagers' punitive damages and attorneys' fees for failure to file a pretrial order. Schwagers filed a motion for rehearing which was held and at which time Judge Wittig upheld his decision. However, after the hearing, Judge Wittig in a discussion with Mr. Schwager inferred that if Mr. Schwager fired Mr. Dennis, he would reinstate the stricken pleading. Mr. Schwager did this but Judge Wittig did not reinstate the punitive damages and attorneys' fees. Mr. Dennis had been accused of drug use by the receiver, Dale Everett, in a hearing before Judge Wittig. Mr. Schwager filed a Writ of Mandamus with the First Court of Appeals against Judge Wittig which was denied. The First Court of Appeals refused to even consider the Writ of Mandamus. **The unconscionable conduct of Judge Wittig in this matter is shown by his own Court Rules.**

   Rule 17. Sanctions should be the last resort of attorneys and litigants who have tried all manners of communication, reason, courtesy, professionalism and accommodation first.

   RULE 18(2). PRE-TRIAL ORDER IS REQUIRED IN ALL CASES AND MUST BE FILED *ONE WEEK BEFORE DATE OF TRIAL.* (Emphasis added.) Note: Order striking pleading of Schwagers was issued on June 23, 1989. *Date of trial was Nov. 8, 1989*, some *five (5)* months later.

2. Attempted to hold Schwager in contempt of court several times when he did not have jurisdiction.

3. Refused to follow the law and rules of procedure of the State of Texas in order to have TCB win the lawsuit.

4. Stated before the trial that he was not going to let the Bank lose the lawsuit.

5. Retried Bruce B. Schwager twice for the same offenses.

6. Allowed perjury to be committed in his court before and during the trial of Case #87-14551.

7. Violated Bruce Schwager's constitutional right to a jury trial before sentencing him to jail and fine for contempt of court.

8. Threatened Bette Schwager with the possibility of being *shot by the bailiff* during the trial of Cause #87-14551.

9. As the trial judge controls the outcome of the case regardless of the presence of a jury, his independence is *crucial* to obtaining a fair hearing. The jurors were frequently dismissed when conversations were taking place between the lawyers and the judge. **The judge decided what evidence the jury should hear and what should not be divulged to them.** The record of this case shows that Judge Wittig wrongfully withheld evidence from the jury that was critical to Schwagers.

Note: Judge Wittig's unconscionable conduct and rulings were not overturned as the 1st Court of Appeals of Texas struck 43 of Petitioners' 44 points of error for procedural defects. (Refer to record of the case and Schwagers' Petition for Writ of Certiorari.)

The present unconstitutional selection system of judges in the State of Texas allows lawyers to contribute to the election of a judge and then practice in front of that judge and neither the judge nor the lawyer are required to disclose this fact to the opposing parties. Would poor citizens like Schwagers dare to believe that a judge might be influenced by a money payment or that a lawyer might donate money with the expectation of something in return?

The answer is clearly "Yes" as demonstrated by Schwagers' Petition for Writ of Certiorari and this document.

2. **Petition for Writ of Certiorari to the Supreme Court of Texas Issue #2, page 15.**

This issue is true and correct as written. No further comment is required at this time.

3. **Petition for Writ of Certiorari to the Supreme Court of Texas Issue #3, page 18.**

This issue is true and correct as written. No further comment is required at this time.

4. **Petition for Writ of Certiorari to the Supreme Court of Texas Issue #4, page 22.**

This issue is true and correct as written.

History shows that judges who received large campaign contributions have put the interests of the contributors above that of the citizenry, and are engaged in legislating law from the bench in defiance of statutory and case law, constitutional tripartite government and their oath to uphold the law and the Constitution. Seemingly, the fundamental principle of stare decisis, or precedential law, has been disregarded and renounced in every forum in favor of campaign contributions and personal bias and prejudice. Clearly, the trial court has changed the statutes and case law in favor of the large corporation, TCB, and the large defense law firm, Baker & Botts, thus denying the Schwagers their fundamental right of due process of law.

In *King v. Finch*, 428 F.2d 709 (5th Cir. 1970), the court wrote:

> We do not dispense with the possibility that there might be a case in which the application of new standards or procedures to pending cases might interfere with the judicial power as it was created by the Constitution. It is clear, for example that a sudden change in procedure may constitute a denial of due process.

Certainly, this has occurred in the instant case. Schwagers' due process rights were obliterated by the abrupt and capricious and

biased manner in which the case was tried and ruling made in the courts of Texas.

Due process itself is not a technical conception with a fixed content unrelated to time, place and circumstances: It is a general requirement that legal processes follow the forms of law, be appropriate to the case, and be just to the parties affected. *Joint Anti-Fascist Refugee Committee v. McGrath* 341 U.S. 123, 91 S. Ct. 6024, 95 L. Ed. 817 (1951). Texas courts have refused to consider this case on its merits as previously set out by Petitioners. Nor have they addressed the requirement that the legal process follow the forms of law and serve the ends of justice. Obviously, as shown in this case, where statutory laws and precedential court decisions are disregarded during legal process, there is no due process. Due process cannot be obtained when the Texas courts establish special conditions based on campaign contributions and personal bias and prejudice. Due process applies to the method of making a judicial decision as well as protection of procedural and substantive rights. *State ex rel. Merriman v. Ball*, 116 Tex. 527, 296 S.W. 1085 (1927).

5. Petition for Writ of Certiorari to the Supreme Court of Texas Issue #5, page 26.

This issue is true and correct as written.

In *The Best Defense*, professor Allen Dershowitz states of the "elite" legal system, corruption and hypocrisy of top level judges that "one working title for his book was *Black Robes, White Lies*"; "that would have been appropriate because lying, distortion, and other intellectual dishonesty are endemic among judges. In my twenty years of experience in the practice of law, I have been more disappointed by judges than by any other participants in the criminal justice system." His book states "how pervasive judicial dishonesty has become"; he ponders "why judges are permitted to get away with, and indeed are often praised for this kind of intellectual dishonesty, is an important and largely unanswered question confronting the American legal system." He claims that students are "constantly exposed to the temptation to cheat elite" by "observing the respected judge who falsely claimed to have read a transcript." "Cheat elite is the most insidious form of corruption

in the American legal system today because nobody tells those who practice it that they are as corrupt as those who take bribes."

The "cheat elite," judicial fraud, obstruction of justice, deprivation of access to the courts or due process, unfair tribunal, invidiously discriminatory animus, or whatever the label, this putrid process confronts the Supreme Court who are voluntarily sworn before God and the people to oversee and administer this honest and moral anchor of our nation. A lonely legal ethicist, professor Monroe Friedman, presented his study of "frivolous and vexatious" judicial opinions to the judicial conference of the federal circuit:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the case that have been filed and argued before the judges. I am talking judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make the disingenuous use or omission of material authorities, judicial opinions that cover up these things with no publication and no citation rules.

This is exactly what Judge Cohen of the Texas First Court of Appeals perpetuated on Schwagers when he struck 43 of their 44 points of error for procedural defects. He further wrongfully changed the ruling in Case #86-0736 without jurisdiction based on false information.

CONCLUSION

ANY REASONABLE PERSON WOULD CONCLUDE THAT CAMPAIGN CONTRIBUTIONS FROM LAWYERS TO JUDGES ARE LEGALIZED BRIBERY.

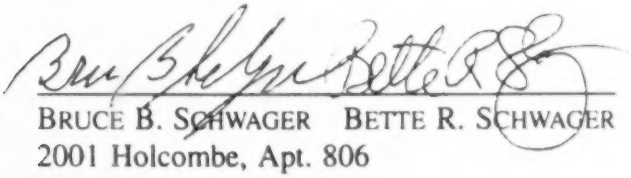
James Madison, in proposing the Bill of Rights, emphasized that *independent* tribunals of justice will consider themselves in a particular manner the guardian of those rights. I *Annals of Congress*, 439 (1789). The judiciary at all levels, federal, state, city, county, etc., must be independent. Even the appearance of impropriety cannot be tolerated. John Marshall in 1788 showed the importance of an independent judiciary when he stated, "To what

quarter will you look for protection from an infringement on the Constitution if you will not give the power to the judiciary?" The U.S. Constitution, Article II, Section 2 and Article III, Section 2 (Appendix "G" of this document) mandate that federal judges be appointed and serve for life, so as to allow for an independent judiciary. Archibald Cox, *Courts and the Constitution* (1987). Thus, it is critical that the U.S. Supreme Court declare the Texas Election Code for judges unconstitutional and require that judges in Texas be selected based on the federal system.

Who protects my rights, our rights, the rights of those not blessed with the financial ability to invest in the campaign contribution franchise?

On March 27, 1993, Judge Tom Phillips, Chief Justice of the Texas Supreme Court, objected to the proposed order signed by Governor Richards of Texas relating to *League of United Latin American Citizens v. Clements*, No. 908014. (Appendix "F" of this document.) Prior to this date, on March 26, 1993, Bruce Schwager wrote a detailed analysis of this settlement as set out in Appendix "C" of this document. The content of this report closely parallels the view of Judge Phillips. This Court has the opportunity to dispense justice to all citizens of the State of Texas and preclude the untold expenditure of taxpayer dollars by now ruling that the system of selecting judges be changed to a federal system or to an appointment/merit system now being used by some 33 states of the Union. This ruling would make moot the continuing litigation in *League of United Latin American Citizens v. Clements*, No. 908014.

Respectfully submitted,



BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030

Pro Se (Verification Appendix "K")

APPENDIX TABLE OF CONTENTS

		Page
APPENDIX "A":	Letter to the Supreme Court of the United States, 3/16/93	A-1
APPENDIX "B":	Letter to the Supreme Court of the United States, 3/27/93	B-1
APPENDIX "C":	Comment on Proposed Order (*LULAC v. Clements*)	C-1
APPENDIX "D":	Baker & Botts' Letter to the Supreme Court of the United States, 2/23/93	D-1
APPENDIX "E":	Baker & Botts' Letter to the Supreme Court of the United States, 3/25/93	E-1
APPENDIX "F":	*Houston Chronicle* article, 3/27/93	F-1
APPENDIX "G":	U.S. Const. articles II & III	G-1
APPENDIX "H":	Reply Brief Texas Supreme Court	H-1
APPENDIX "I":	Chart of Funds - Campaigns	I-1
APPENDIX "J":	Judge Wood Memo	J-1
APPENDIX "K":	Verification	K-1

APPENDIX A

2001 Holcombe #806
Houston, TX 77030
March 16, 1993

Mr. Frank Lorson
Chief Deputy
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: No. 92-1265 Bruce B. Schwager, et al. v. Texas Commerce Bank, N.A., et al.; On Petition for a Writ of Certiorari to the Supreme Court of Texas.

Dear Mr. Lorson:

Bruce B. Schwager and Bette R. Schwager, Pro Se Petitioners in the above stated action, respectfully request the following:

1. Thirty (30) days (April 26, 1993) to file a reply to Respondents' Brief. The time for filing Respondents' Brief has been extended 30 days (March 26, 1993) by the U.S. Supreme Court, letter dated Feb. 25, 1993.

2. An increase to 20 pages for Petitioners' Reply Brief.

3. Delay consideration of Respondents' brief until after Petitioners' filing of their reply brief.

Note: It is critical that Petitioners file a reply brief, as Respondents have made false statements and misrepresented the facts of this case in the courts of Texas. (Petitioners' Issue #5).

The reason used for the extension of time requested by Respondents in which to file their brief supports in part Petitioners' requests herein stated.

At the present time, the Texas Election Code's (Petitioners' Issue #1) constitutionality is being considered by the United States Appeals Court, Fifth Circuit. League of United Latin American Citizens v. Clements, No. 908014, Feb. 11, 1993. (Encl. "A"). The ruling in this case could possibly affect argument to be made in Petitioners' reply brief.

It is incredible that a law firm with hundreds of attorneys and paralegals (Encl. "B") and the unlimited funds of one of the largest banks in the United States requested and received an extension of time to file Respondents' brief. Further, this litigation has been ongoing for approximately six (6) years, transcending the Texas district, appeals and supreme courts.

It is now clear that Baker & Botts requested their extension of time so as to ensure that Respondents' brief would be filed subsequent to former Republican Secretary of State James Baker becoming a "senior" partner of the law firm. James Baker was previously a member of the law firm of Andrews & Kurth. (Encl. "B").

Thank you for your usual courtesy and cooperation.

Yours truly,

Encl. "A"
Encl. "B"

/s/ Bruce B. Schwager Bette R. Schwager
Pro Se Litigants

cc: Mr. Joseph D. Cheavens (Encl. "A" & "B")
Mr. Newton B. Schwartz (Encl. "A" & "B")
Mr. Neil S. Levin (Encl. "A" & "B")

APPENDIX B

2001 Holcombe #806
Houston, TX 77030
March 27, 1993

Mr. Frank Lorson
Chief Deputy
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: No. 92-1265 Bruce B. Schwager, et al. v. Texas Commerce Bank, N.A., et al.; On Petition for a Writ of Certiorari to the Supreme Court of Texas.

Dear Mr. Lorson:

In view of the fact that TCB through its attorney, Baker & Botts, has seen fit to file a "Response Brief" in the form of a letter dated March 25, 1993 which violates Rule 15 of the U.S. Supreme Court, Petitioners request that this "response" be dismissed.

The response letter does not even reach the level of a motion which should not be received by this Court as set out in Rule 15.4. Clearly, Respondent TCB's letter is not only an attempted Response Brief, but also a request to dismiss the Petition for Writ of Certiorari.

Rule 15.1 in part states that counsel are admonished that they have an obligation to the Court to point out any perceived misstatements of fact or law in the brief in opposition, and not later. Certainly, overbroad, unverified, unreferenced, outrageous, false, and baseless statements made in Paragraph 2 of Respondent TCB's

letter to this Court do not fulfil the preceding requirement. Further, this letter does not mention misstatements of fact or **LAW**.

Note: Bruce Schwager has sworn to the truthfulness of his pleadings under the penalty of perjury.

With no qualified response being filed to Petition for Writ of Certiorari to the Supreme Court of Texas, this Court should grant Schwagers' Petition as demonstrated by Rule 15.1.

However, Petitioners will file with this Court on or before April 2, 1993 a Reply/Supplemental Brief which will be in accordance with the Rules of the U.S. Supreme Court.

Petition for Writ of Certiorari to the Supreme Court of Texas issue #1 pertaining to the election of judges in the State of Texas, alone warrants a review by the U.S. Supreme Court.

This Court has the opportunity to dispense justice to all citizens of the state of Texas and preclude the untold expenditure of taxpayer dollars by now ruling that the system of selecting judges be changed to a federal system or to an appointment/merit system now being used by some thirty odd states of the Union. This ruling would make moot the continuing litigation in League of United Latin American Citizens v. Clements, No. 908014, now before the U.S. Court of Appeals, Fifth Circuit.

Thank you for your usual courtesy and cooperation.

Yours truly,

/s/ Bruce B. Schwager Bette R. Schwager
Pro Se Litigants

cc: Mr. Joseph D. Cheavens
Mr. Newton B. Schwartz
Mr. Neil S. Levin

P.S.: **Chief Justice of the Texas Supreme Court Tom Phillips agreed with the Schwagers and admitted the validity of their Petition for Writ of Certiorari to the Supreme Court of Texas when he stated, "The proposed settlement does nothing to decrease the influence of partisan politics and big money in judicial elections."** (Underlined for emphasis). Houston Chronicle, March 27, 1993, page 25A (League of United Latin Americans v. Clements, No. 908014).

APPENDIX C

Comment on Proposed Order (*LULAC v. Clements*)

The Governor of Texas signed a proposed order in the *LULAC* case on March 25, 1993. This proposed order would only compound an existing problem with the election of judges in the State of Texas. The effect of this proposal would completely destroy any possibility that the judiciary in Texas would be independent as required by the Constitution of the United States.

It has been demonstrated in the past that Texas has been unable to solve its own problems without federal intervention. The jail question is an excellent example of this.

Eventually, this Court will be required to decide the issue of the Texas Election Code for judges in the State of Texas.

As this issue is now before the U.S. Supreme Court, it behooves the court to decide this issue now and declare the Texas Election Code for judges unconstitutional. Election of judges in Texas should follow the federal system or some type of appointment/merit system. Thirty-three states have changed to this type of system, and Texas is the only state that does not limit to some extent campaign contributions to judges.

When Arizona changed to an appointment/merit election, the quality of the judiciary improved 100 percent, and this change solved the need for campaign contributions from attorneys. U.S. Supreme Court Justice Sandra Day O'Connor, Appendix "K," p. K-3, of the Petition for Writ of Certiorari to the Supreme Court of Texas.

APPENDIX D

BAKER & BOTTS
L.L.P.
ONE SHELL PLAZA
910 LOUISIANA
HOUSTON, TEXAS 77002-4995

G-43,606 February 23, 1993

Mr. Frank Lorson
Chief Deputy
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

VIA FEDERAL EXPRESS

Re: No. 92-1265, *Bruce B. Schwager, et al. v. Texas Commerce Bank, N.A., et al.*; On Petition for a Writ of Certiorari to the Supreme Court of Texas.

Dear Mr. Lorson:

As counsel for two of the Respondents, Charles Best and Texas Commerce Bank, N.A. (collectively "Texas Commerce Bank") in the above-styled action, I respectfully request an extension of forty (40) days in which to file Respondent's Brief in Opposition to Petitioners' Petition for Writ of Certiorari. Respondents' Brief in Opposition is currently due February 24, 1993, and this is Respondents' first request for an extension.

The trial court transcript underlying this action consists of approximately 5,000 pages, and the Petition for Writ of Certiorari impacts each of Petitioners' 44 Points of Error from the underlying appeals. While Texas Commerce Bank denies that petitioner's petition raises any viable arguments regarding federal law, petitioners raise a number of unusual arguments in the Petition for

Writ of Certiorari, which require Texas Commerce Bank to review both the trial transcript and appellant record in order to adequately address the points in opposition to the Petition for Writ of Certiorari.

Thank you for your usual courtesy and cooperation.

Very truly yours,

/s/ Joseph D. Cheavens
Attorney for Respondents
Texas Commerce Bank, N.A.
and Charles Best

cc: Mr. Bruce B. Schwager
Ms. Betty R. Schwager
Mr. Newton B. Schwartz
Mr. Neil S. Levin

L1130/0099/09NX01

APPENDIX E

BAKER & BOTTS
L.L.P.
ONE SHELL PLAZA
910 LOUISIANA
HOUSTON, TEXAS 77002-4995

G-43,606 March 25, 1993

Mr. Frank Lorson **VIA FEDERAL EXPRESS**
Chief Deputy
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: No. 92-1265, *Bruce B. Schwager, et al. v. Texas Commerce Bank, N.A., et al.*; On Petition for a Writ of Certiorari to the Supreme Court of Texas.

Dear Mr. Lorson:

In view of the fact that this case clearly does not warrant review by this Court, Respondents Charles Best and Texas Commerce Bank, N.A. (collectively "Texas Commerce Bank") respectfully waive the right to file a brief in opposition to the petition for writ of certiorari to the Supreme Court of Texas.

Texas Commerce Bank requested and received an extension of the time in which to file a brief in opposition so that it could review the trial transcript and appellate record in order to adequately address the points in opposition to the petition. Upon review, it has become abundantly clear to Texas Commerce Bank that the petition is completely without merit and based upon unfounded allegations of bribery, improper influence and perjured testimony, as well as gross mischaracterizations of the proceedings below. No

"special and important reasons" exist sufficient for the granting of the petition for a writ of certiorari. Texas Commerce Bank respectfully requests leave to file a response to the petition should this Court wish to see one, however.

Thank you for your usual courtesy and cooperation.

Very truly yours,

/s/ Joseph D. Cheavens
Attorney for Respondents
Texas Commerce Bank, N.A.
and Charles Best

cc: Mr. Bruce B. Schwager
Ms. Betty R. Schwager
Mr. Newton B. Schwartz
Mr. Neil S. Levin

L1748/WP09/01EH04

APPENDIX F

Justice takes constitutional approach

Phillips opposes lawsuit on judges' elections

By R.G. Ratcliffe
Houston Chronicle
Austin Bureau

AUSTIN — Texas Supreme Court Chief Justice Tom Phillips on Friday said any change in how Texas chooses its judges should be done by a constitutional amendment approved by voters, not by a lawsuit settlement.

Phillips said he will oppose an effort to use a proposed lawsuit settlement to change how the state's top counties select their trial court judges.

"As a matter of sound policy, no change of this magnitude should be made by mere settlement of a lawsuit," Phillips said.

"The proposed settlement does nothing to decrease the influence of partisan politics and big money in judicial elections," he said. "All it does is remove the right of the people to vote for most of their judges in the affected counties."

Phillips, a Republican, is a named defendant in the lawsuit the NAACP and the League of United Latin American Citizens brought against the state in an effort to change how judges are elected in the state's most populous counties.

Phillips was not included in talks between the state's Democratic leaders and the minority plaintiffs that resulted in a proposed settlement that was signed Thursday.

But Attorney General Dan Morales, a Democrat, described Phillips as a "nominal" party in the lawsuit who did not need to be included in the negotiations.

"We believe the real party of interest in this litigation is the state of Texas," Morales said.

Gov. Ann Richards, Lt. Gov. Bob Bullock and House Speaker Pete Laney off on signed a proposed lawsuit settlement that would halt the county-wide election of most trial court judges in Harris, Dallas, Bexar, Jefferson, Tarrant, Travis, Lubbock, Midland and Ector counties.

Morales said the plan will be presented to the U.S. 5th Circuit Court of Appeals as a proposed lawsuit settlement once it receives a majority vote of the Texas Legislature in the form of an endorsement resolution.

A 5th Circuit judicial panel in January ruled that the county-wide system of electing trial court judges dilutes minority voting strength. In Harris County, only two of 59 elected district judges are black. The full 5th Circuit is set to review that decision next month.

The proposed settlement calls for electing 50 of the counties judges from the county's 25 state House districts. The only residency requirement would be that a judicial candidate live in Harris County.

Nine Harris County judges would be elected at large. Those include the 127th District Court (civil); 177th Criminal); 61st (civil); 230th (criminal); 245th (family); 310th (family); 311th (family); 313th (juvenile) and 312th (family).

Morales said the proposed settlement also is drafted to "moot" possible opposition for defendant district court judges Sharolyn Wood of Houston and Harold Entz of Dallas.

Morales said their districts will be left as county-wide, at-large districts and not be made more restrictive judicial subdistricts as with other courts.

"These offices don't belong to politicians. They don't belong to individuals. They belong to the people of Texas," Morales said.

"I don't claim any property rights other than those bestowed on me by the voters of Harris County," Wood said.

Wood said she plans to fight the proposal, which she described as "wheeling and dealing, trading in the dark, selling out the judiciary of Texas."

She said judges elected in House districts could become pawns of legislators who control judicial funding and partisan gerrymandering.

Wood noted that the Harris County judiciary presently is split about in half between Republican and Democratic officeholders. But the Harris County House delegation has 10 Republican districts and 15 Democratic districts.

State Sen. Rodney Ellis, D-Houston, who has been pushing for the adoption of judicial elections by districts, praised the proposed settlement. "The settlement demonstrates the state's new commitment to the civil rights and voting rights of minorities, who historically have had to wait for the courts to mandate progress on these issues," he said.

APPENDIX G

The Constitution of the United States

Article. II.

Section. 2. . . . .

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Minsters and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

APPENDIX H

NO. D-2528

****

IN THE SUPREME COURT OF TEXAS

****

BRUCE B. SCHWAGER, ET AL.

Petitioners,

v.

TEXAS COMMERCE BANK, N.A., ET AL.

Respondents.

****

PETITIONER'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners Bruce B. Schwager, Bette Schwager, B.B.M.M., Ltd. and B.M. Bayou Corporation, hereinafter called "Schwagers" or "Petitioners" respectfully file this Reply to Respondents Texas Commerce Bank, N.A. and Charles Best, hereinafter called "TCB" or "Respondents'" Response to Petitioners' Application for Writ of Error. Respondent's Brief was received by Petitioners on July 22, 1992. Petitioners did *not* receive briefs from any of the Limiteds until July 29, 1992. Petitioners object to the Limiteds' brief, and it should not be considered in the Supreme Court's ruling.

OPENING STATEMENT

Petitioners' belief that the Texas Supreme Court will rule in their favor has been reinforced by a review of Respondents' Brief. The judgment against Petitioners should not only be reversed because it is legally incorrect, but also to prevent chaos in the Texas legal system. A ruling against "Schwagers" will send the message to all litigants that the existing Texas Supreme Court precedents on jurisdiction, final judgment, liberal construction of briefing rules, and jury issues are no longer valid, opening a floodgate of new litigation on these matters. Petitioners will attempt to be brief in this statement. However, this has been made extremely difficult by Respondents' use of 15 pages for their opening statement. This has been done to discredit Mr. Schwager and unduly influence the Court with false and misleading statements prior to any ruling on the merits of Petitioners' Points of Error. Respondents have basically used the same statement that was contained in their "Appellees' Brief" for the First Court of Appeals. Petitioners have included their reply to this statement from their Appellants' Response Brief (filed Feb. 13, 1992) as Exhibit A. Petitioners have referenced: 1 U.S. Supreme Court case. 37 Texas Supreme Court cases. 1 Alaska Supreme Court case. 39, out of 81 cases referenced, to support their Application for Writ of Error. A reading of Petitioners' Application for Writ of Error clearly shows that the First Court of Appeals did not apply the existing law regarding *jurisdiction* or the true facts of this case in reaching their incorrect judgment. The First Court of Appeals did not review the entire record of this case as required to fulfill their mandate. The First Court of Appeals argues for the validity of the consolidation of Case #86-07376 and 87-14551. Thus, they were required to review the Record from Case #86-07376. *Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). The appeals court's decision demonstrated that this was not accomplished. TCB devotes a portion of the first and second pages of their brief to the striking of 43 of Petitioners' 44 points of error. These 14 lines of rhetoric do not include one record reference. Further, TCB incorrectly states the facts of the case.

Respondent incorrectly states the holding in *Inpetco v. Texas American Bank/Houston N.A.*, 729 S.W.2d 300 (Tex.1987).A reading of this case does not state that Appellants are only entitled to a single opportunity to re-brief. In fact, the word *single* does not appear anywhere in that opinion. However, the word that does appear in that opinion is the word "such". The definition of that world found in *Black's Law Dictionary*, Fifth Edition, page 1284, is, "of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned." The preceding clearly demonstrates that the court should make objection to *specific* defects and irregularities in Appellants' brief prior to striking points of error. Petitioners were not allowed to re-brief after specific defects and/or irregularities were stated by the First Court of Appeals. (Order 2-24-92). Petitioners were ordered one time by the First Court of Appeals to re-brief for defects and/or irregularities. The only reason given at that time was the lack of S.F. references. (Order 5-16-91). This re-brief was accomplished and approved by the First Court of Appeals. (Order 8-8-91). Complaints made about Petitioners' brief in the First Court of Appeals by TCB were answered in (Petitioners') Appellants' Response Brief, (Feb. 13, 1992). Petitioners made a detailed review in their Application for Writ of Error (A3-1-9) on the circumstances surrounding the re-briefing, not a partial one as TCB has submitted. TCB also ignores the fact that the First Court of Appeals refused to consider Appellants' Brief filed Feb. 13, 1992. The Feb. 13, 1992 brief was not reviewed by the First Court of Appeals prior to the court striking 42 of 44 points of error *two days* before oral argument. Petitioners state certain points here to show that refusal of the trial court to allow into evidence the Axelrad Letter (Def. Exh. 124, p.3, ¶ 3), Stringer Memos (Def. Exh. 55, 56), and Stringer Adverse Loan Documents (Def. Exh. 57-62), allowed TCB to make false statements which influenced the jury to rule against "Schwagers." Not less than three times, beginning on page 4, in Respondents' brief, they demonstrate the following.

TCB WAS NOT A PARTY TO NOR WAS EVEN AWARE OF THE 1986 SUIT UNTIL THE TRIAL HAD ALREADY BEGUN. NONE OF ITS AGENTS TESTIFIED OR WERE PRESENT AT THAT TRIAL NOR WERE THEY DEPOSED IN PREPARATION FOR IT. TR. 135-40, S.F. 366, 11/21/89 312-313." Stephen Smith, an attorney who did work for TCB, and thus an agent, testified at the trial of Case #86-07376. Mr. Smithwas the one who suggested using TCB for the refinancing, not Mr. Schwager. (Testimony of Stephen Smith Hearing July 14, 1986 pp. 8,9). Mr. Smith was still working for TCB when he testified at trial in November of 1989. (S.F. 1634). Mr. Smith's testimony further shows the falsity of TCB's statement about not having knowledge of the 1986 lawsuit when he testified (7/14/89) as follows when questioned by the Limiteds' attorneys:

Q: HAVE YOU HAD ANY CONVERSATIONS WITH THE TEXAS COMMERCE BANK-CHEMICAL SINCE THE NOVEMBER 27TH 1985 MEETING WITH THE DEFENDANTS IN THIS LAWSUIT? WITH RESPECT TO THE LOAN WHICH THAT BANK MADE TO THE PARTNERSHIP.

A: ONLY DISCUSSION I'VE HAD IS THAT THERE WAS ONGOING LITIGATION AND THEY SAID THAT THEY UNDERSTOOD THERE WAS SOME PROBLEMS, CONFLICTS AMONG THE PARTNERS. AS LONG AS THE PAYMENTS WERE MADE, THEY WEREN'T CONCERNED AND THIS WAS SORT OF NOT SOMETHING THEY CALLED ME; IT WAS JUST A MATTER OF PASSING CONVERSATION IT WAS OF NO MOMENT TO THEM. S.F. TESTIMONY OF STEPHEN J. SMITH FROM THE HEARING BEGINNING JULY 14, 1986. PAGE 66. **Note:** Mr. Smith was called as an adverse witness by plaintiff Bruce B. Schwager et al. Mr. Smith settled Schwager's lawsuit against him for $100,000. S.F. 1282. TCB's continuing argument on pages 5 and 6 about the complexity of the case and size of the record demonstrates that the First Court of Appeals erred in denying Petitioners' (Appellants') brief of 99 pages. TCB for some reason brings up the attempted dismissal of T. Ransom Cornish.

However, they make no attempt to mention that Alfred Zimmerman, Axelrad's partner, testified at trial. It is undisputed that Zimmerman's law firm argued against Petitioners' Motion for a New Trial even after having testified against "Schwagers" at trial. (Tr. 1302) (S.F. Vol. 11-21-89, pp. 3-52). The First Court of Appeals did not rule on Petitioners' claim that they were entitled to open this case first as they were Plaintiffs. The appeals court ignored this argument. (Motion for Rehearing 3-27-92). TCB for the first time states in its reply brief (7-20-92) that the 1986 judgment was a partial judgment which is not true, as the record and statement by the trial court Judge O'Brien, presiding demonstrates "the 1986 lawsuit is over and final." (S.F. Hearing May 26, 1992, p.34). Further, the statement that the receiver was appointed to *manage* the land is untrue. (S.F. 593). On page 10 of the Respondents' Petition, they give the best example of the false statements being made. TCB tries to gain favor with this Court by attempting to show that the Limiteds had permission to talk to TCB prior to TCB having met with the Limiteds. TCB states that in either October or November 1986, Limited Partners Meyer Fallas and William Cramer approached TCB in order to seek to refinance the loan. However, their S.F. ref. 425 clearly shows that it was in October 1986. TCB also states that prior to TCB's talking to the Limiteds, Receiver Everett had informed Charles Best, a TCB bank officer and party to this case that Judge O'Brien had approved TCB's meeting with the Limiteds for the purpose of negotiating a refinancing agreement. S.F. 385. Mr. Best thus testified, S.F. 385, that he had the court's permission to speak with the Limiteds, and he later testified that was in October of 1986. S.F. 425. However, their own witness, Mr. Everett testified that he first gave permission in either December or January. (S.F. 598-600). **THUS IT WAS IMPOSSIBLE FOR TCB TO HAVE PERMISSION. CERTAINLY DECEMBER COMES AFTER OCTOBER.**

Note: Petitioners contend that Judge O'Brien did not give permission either in October, November, December, January, or anytime. The receiver was the one to speak to Bank, not Limiteds. If Judge O'Brien would have been allowed to testify, this would have been proved. (Point of Error 19, Appellants' Opening Brief).

Petitioners' briefs filed in this Court and the First Court of Appeals have been verified. (Exhibit B). **PETITIONERS' RESPONSE TO RESPONDENTS' REPLY POINT #1 TO PETITIONERS' POINT OF ERROR #1: THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT HAD JURISDICTION TO CONSOLIDATE CASE #86-07376 WITH CASE #87-14551, AND RETRY CASE #86-07376 BASED ON THE JUDGMENT RENDERED IN CASE #86-07376 NOT BEING FINAL. (OPINION AT 6).**

The case law shown by Petitioners unequivocally proves that the trial court lost jurisdiction over Case #86-07376 after the judgment became final, and, thus, there was no jurisdiction over the consolidated case. Petitioners' Point of Error #1 is conclusive. It contains the utmost detail of the facts and law pertaining to this case, which is supported by S.F. and Record references. The case law is supported by no less than seventeen (17) Texas Supreme Court cases. Respondents do not give one Supreme Court case to support their position on the finality of the 1986 Judgment.

Note: The Northeast School District case holding stated by the First Court of Appeals is erroneous. The primary holding in that case is that a judgment is presumed final after a conventional trial on the merits. (State Bar of Texas Advanced Appellate Practice Course 1987 (at page G-8). There was nothing left unresolved in the 1986 Judgment. (Application for Writ of Error A2-9-14). There is absolutely no basis in law or fact to support the First Court of Appeals' ruling that the judgment issued in Case #86-07376 was interlocutory.

Note: In over five years of litigation, TCB never made the claim that the appointment of the receiver made the 1986 judgment interlocutory. Thus, why then did the First Court of Appeals make this ruling? A final judgment is one that determines the right of all the parties to the suit and disposes of all the issues resolved. The judgment entered by Judge O'Brien in Case #86-07376 left nothing to be resolved. As Judge O'Brien stated, "The 1986 lawsuit is over and final." (S.F. Hearing May 26, 1987, p. 34 - Application for Writ of Error A-2-19).

It is unconscionable that TCB has the audacity to suggest to this Court that Judge O'Brien rendered an incomplete judgment which was advantageous for Petitioners. (p. 16). Further, a final judgment is one that terminates the litigation of the parties on the *merits* of the case so that nothing remains to be done but to *execute* the judgment according to its terms. Judge O'Brien stated, "The only thing I have any continuing jurisdiction over in aid of my judgment is a receiver, but that doesn't mean everybody can turn around and sue everybody and bring up a whole new thing that doesn't have anything to do with the receiver." (S.F. Hearing May 26, 1987, p. 36 - Application for Writ of Error A2-21). Judge O'Brien made it abundantly clear that Case #86-07376 was not consolidated with Case #87-14551 (Order signed July 27, 1987 - Application for Writ of Error A2-22), and it is unconscionable for TCB to suggest otherwise. Exhibit C contains some of the false and misleading statements made by TCB contained on pages 15, 16, 17, 18, and 19 of their brief. "TCB" totally ignores the existence of any of the Texas Supreme Court cases listed by "Schwager." Special note is made of *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477 (Tex. 1988). To show the extreme importance of this case, Petitioners respectfully request that this Court review the following statement. From the beginning of this controversy, Respondent TCB has sought to ignore or, at best, gloss over the jurisdictional issues raised by "Schwagers." TCB has asserted that the appointment of the receiver vested the trial court with continuing plenary jurisdiction over the property. However, "Schwagers" have contended that the jurisdiction retained is limited to entry of appropriate orders to enforce the judgment and administer the receivership. The Supreme Court has previously held that the mere appointment of a receiver in an otherwise final judgment does not vest the trial court with continuing plenary jurisdiction over the parties or property involved. To have held otherwise and adopted the broad theory of jurisdiction espoused by the First Court of Appeals would virtually destroy the doctrine of "finality of judgments" and cause total chaos in all post-judgment receiverships. Once a final judgment has been entered, case law mandates that the trial court loses jurisdiction and that a consolidation filed thereafter must be dismissed.

The critical question thus becomes whether the 1986 judgment, from which there was no appeal, became final upon the expiration of thirty (30) days from its entry date or whether the appointment of the receiver kept the judgment from becoming final. A review of the judgment and the applicable authorities shows that the judgment became final notwithstanding the appointment of the receiver. On page one, the "86" Judgment states the " all issues of fact and law have been submitted to the Court and the Court having considered evidence, issues the following Judgment." The Judgment did not reserve any rulings on any issues or as to any parties then before the court. As previously indicated, the judge signed the order on October 14, 1986, and there was no appeal. A judgment is final when there has been an adjudication as to all parties and pending issues, based on facts then before the court. *Gani v. Gani*, 495 S.W.2d 576 (Tex. 1973). Without question, the judgment in question here is addressed all contested issues and all litigants then before the court. Although a receiver was appointed, his duties were specifically detailed and there are no issues remaining to be litigated as a result of the receivership. That certain provisions of a judgment are to be performed in the future does not preclude a judgment from becoming final. *Schwartz v. Jefferson*, 520 S.W.2d 881, 887 (Tex. 1975). In *Schwartz*, Mrs. Franzheim was awarded $300,000.00, provided that the sum would be used by her for the construction or purchase of a new residence for herself and children within one year from the date of the judgment. Mr. Franzheim was awarded the residence previously occupied by the parties, subject to Mrs. Franzheim's right to occupy the property for one year from the entry of the judgment or until she moved to a new residence, whichever occurred first. *Id.* at 883. There is no substantive difference between those provisions and a provision that, for example, appoints a receiver to sell the property of B.B.M.M., Ltd. with the partnership agreement being held *valid*. The partnership agreement clearly spelled out the distribution of proceeds from the sale. Just as those post-judgment actions in *Schwartz* did not preclude the divorce decree from becoming final, neither does the appointment of the receiver in this action. The receiver's only duty was to sell the property located at 110-112 Travis Street.

All issues before the court when the judgment was entered were adjucated and the receivership was but a means to enforce the judgment. "Schwagers" respectfully submit that the trial court lost plenary jurisdiction on the expiration of thirty days after the judgment was signed. After that time, the trial court retained only its inherent power to clarify or enforce its judgment, which enforcement would include the administration of the receivership. *See McGhee v. Eply*, 661 S.W.2d 924, 926 (Tex. 1983); Rule 326b, Tex. R. Civ. P. Under no circumstances could the consolidation of the cases and the actions of the trial court Judge Wittig presiding with respect thereto be construed as clarification or enforcement of the final judgment issued in Case #86-07376. Judge Wittig consolidated Case #86-07376 and Case #87-14551 on May 23, 1988 at the request of TCB. (Exhibit D). For these reasons, "Schwagers" maintain that the Supreme Court should reverse the judgment and dismiss the case.

RESPONSE TO RESPONDENTS' REPLY POINT #2 TO PETITIONERS' POINT OF ERROR #2: THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT RULE ERRONEOUSLY IN DENYING THE APPELLANTS THE RIGHT TO OPEN AND CONCLUDE THE PRESENTATION OF THE CASE, INCLUDING THE VOIR DIRE, THE OPENING STATEMENT, THE EVIDENCE AND THE CLOSING ARGUMENTS. (OPINION AT 7) Petitioners' Point of Error #2 is certainly based on the facts and law of the case. Again, TCB attempts to make an opening statement without any supporting S.F. or Record references. Petitions' point of error is conclusive; it clearly establishes the basis for this Court to reverse the judgment in this case. "Schwagers" have met all requirements to justify this result. Petitioners again point out that the ruling of the First Court of Appeals ignores the main thrust of this Point of Error in their opinion. TRCP #685 sets out without equivocation that "Schwagers" were the Plaintiffs in Case #87-14551. The TRO issued by Judge O'Brien (Tr.230) on March 27, 1987 established "Schwagers" as Plaintiffs in the 1987 case. TCB now tries to make some vain but futile attempt to revive the wrongful ruling of the First Court of Appeals.

On March 20, 1987, TCB wrongfully accelerated the B.B.M.M., Ltd. note (TCB Exh. #24). After reviewing the letter, Petitioners filed their claims against TCB in the form of a TRO. It should be noted that any district court could have issued this TRO and the effect would have been the same. Schwager would be designated as Plaintiff. (TRCP #685). Judge O'Brien unquestionably controverted the argument put forth by TCB when he changed the case number on the TRO issued on March 27, 1987 to 87-14551. (Application for Writ of Error A-2-22). By TCB's own admission, it did not make any claims against "Schwagers" until March 30, 1987. It was unnecessary for "Schwagers" to file a separate petition as Judge O'Brien consolidated the *claims* made by "Schwagers" against TCB in the TRO of March 27, 1987 with the *claims* made by TCB in their petition dated March 30, 1987. Based on these facts, TCB cannot dispute that "Schwagers", not TCB, were the true plaintiffs in case #87-14551. The only jury issue submitted for TCB was one on conversion. As a matter of law, there could be no conversion; thus, TCB had no right to open and close. (Petitioners' Point of Error #2, pp. 24, 25 of Application). Petitioners have demonstrated without a doubt reversible error by not allowing "Schwagers" to open and close as shown in section B of Point of Error #2 (pp. 23, 24 of Application) titled "A Materially Unfair Trial Was Held". When defendant has burden of proof on all special issues, they are entitled to open and close. *Meeve v. Wade*, 512 S.W.2d 372, 374 (Tex. Civ. App.--Austin 1974 writ ref'd n.r.e.). Exhibit E contains some of the false and misleading statements made by TCB in Reply Point #2. It is conclusive that Judge O'Brien did not consolidate Case #86-07376 and Case #87-14551. Judge O'Brien, as previously indicated by Petitioners, knew he could not consolidate a pending case with one in which a final judgment (Tr. 1347 - Application for Writ of Error A2-4) had been rendered. Judge O'Brien further recognized his lack of jurisdiction when he stated, " It is not an amended petition against his clients to which they were never a party in a lawsuit that I'm sure I've lost jurisdiction that was entered in, God knows--October of '86." (S.F. Hearing May 26, 1987, p. 35).

Further, a full reading of Petitioners' Point of Error #2 conclusively establishes the need for this Court to reverse the judgment against Petitioners so that justice can be served in the Court of last resort for civil cases in the State of Texas.

PETITIONERS' RESPONSE TO RESPONDENTS' REPLY POINT #3 TO PETITIONERS' POINT OF ERROR #3: THE FIRST COURT OF APPEALS ERRED WHEN IT STRUCK 42 OF THE APPELLANTS' 44 POINTS OF ERROR BASED ON *HENRY S. MILLER MANAGEMENT CORP. v HOUSTON STATE BANK*, 792 S.W.2D 133-135 (TEX. APP.--HOUSTON [1ST DIST.] 1990, WRIT DENIED), AND TRAP 74. (OPINION AT 5). Petitioners' Point of Error #3 of their Application for Writ of Error conclusively establishes the support for the relief requested therein. Paragraphs 3 and 4 located on page 2 of the Application are sufficient cause to have this Court extend relief requested. Respondents' brief does not justify the outrageous rulings of the First Court of Appeals.

TCB makes a vain attempt to justify the ruling by distorting the record and using untrue statements of fact and law. Based on the actual holding in cases referenced by TCB, none of these cases are relevant to claims made in Petitioners' Point of Error #3. For example, Respondents use *White Budd Van Ness Partnership v. Major Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991), and *Buffalo v. Robbins*, 811 S.W.2d 541 (Tex. 1991), to cloud the issue in this case. Neither of these cases have relevance as they both pertain to striking of appeal for refusal to comply with the fifty-page limit for their brief. (TRAP 131(i)). What is even more outrageous is the false statements made by TCB in its attempt to justify its invalid position. On page 26 of Respondents' brief, it states the following: **"The Court of Appeals ordered the Schwager Parties to rebrief all points of error not already in compliance with the Texas Rules of Appellate Procedure."** A copy of the ruling made on May 16, 1991 by the First Court of Appeals is enclosed. (Exhibit F). A reading of this order will show that TCB's quoted statement is untrue.

THIS ORDER ONLY REQUIRED PETITIONERS TO ADD STATEMENTS OF FACTS REFERENCES TO THEIR BRIEF, WHICH WAS CLEARLY ACCOMPLISHED IN PETITIONERS BRIEF FILED ON JUNE 17, 1992. It is undisputed that TRAP 74(o), 74(p), 83 and 185 are controlling this case. Rules 83 and 185 unequivocally show that the re-briefing shall be based on previously mentioned defects or irregularities by the use of the word "such". There is absolutely no evidence that Petitioners refused to re-brief based on mentioned "such" defects or irregularities. TCB admits on page 26 of its brief that the First Court of Appeals approved Appellants' Opening Brief filed on June 17, 1991. After making this admission, it then has the audacity to state, "Upon further reflection, it struck 42 of 44 points of error because the rebriefed points of error again failed to comply with Tex. R. App. P. 74." It is incredible that this further reflection took place on *Feb. 22, 1992 at approximately 3:00pm., some 42 HOURS prior to oral argument.* The First Court of Appeals approved Appellants' Opening Brief on August 8, 1991 by denying the Limiteds' Motion to Strike. (Application for Writ of Error p.28, item 13). Thus, this incredible **FURTHER REFLECTION TOOK PLACE approximately SEVEN MONTHS LATER.**

It is also noted that TCB tried to mislead this Court by using untrue and misleading statements in its version of the facts surrounding the briefs submitted to the First Court of Appeals. Petitioners have stated the true and complete facts on pages 26, 27, and 28 of their Application for Writ of Error #1-#19. Appendix III of Petitioners' Application for Writ of Error is a detailed analysis of the First Court of Appeals' ruling striking 42 of 44 points of error. Due to the detrimental effect Alfred Zimmerman's testimony had on "Schwagers" case before the jury, Point of Error #18 from Appellants' Opening Brief is herein reemphasized. The First Court of Appeals struck Petitioners' (Appellants') Point of Error #18 (A3-2 Application) due to Petitioners' trial attorney not objecting to Alfred Zimmerman's testimony. Point of Error #18 references S.F. Vol. 11-21-89, pp. 3-52 to support its position that an objection was made and denied.

It was unconscionable for the First Court of Appeals to strike Appellants' Point of Error #18 when the facts of the case are read as follows: On page 3 of S.F. reference, Mr. Nixon, Petitioners' trial attorney, stated, **"I OBJECT TO ZIMMERMAN BEING CALLED...."** On page 6, L. 17 of the preceding S.F. reference, Judge Wittig states the following: **"OKAY, THE COURT OVERRULES YOUR OBJECTION."** An appellant should be accorded the right to appellant review. *Salvaggio v. Brazos Cty. Water Control*, 598 S.W.2d 227, 229 (Tex. 1990). The rules of procedure should be interpreted to prevent the loss of the right of appeal, not to facilitate loss. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978). Respondents do not contest one of the Supreme Court cases that require a liberal construction of the rules. Further, TCB demonstrates that *Most Worshipful Prince Hall v. Jackson*, 732 S.W.2d 407, 412 (Tex. App.--Dallas 1987, writ ref'd n.r.e.), does not apply to the case of appeal. It quotes the following: "It is not the duty of the court of appeals to make an independent search of the statement of facts." It is undisputed that Petitioners' appeals court briefs contained statements of facts references. Thus, it was the obligation of the First Court of Appeals to read these Statement of Facts references as required by the U.S. and Texas Supreme Courts. Petitioners did not plead that the appeals court was required to make an independent search of the Statement of Facts, only that it review the Statement of Facts already contained in Appellants' *briefs* which were filed with the First Court of Appeals on 6/17/91 and 2/13/92. In closing, the Respondents make a last desperate attempt to deny Petitioners' right to appeal. TCB references *Cronen v. County Storage Lot*, No. 01-88-01079-CV at 3 1992 WL 117310 (Tex. App.--Houston [1st Dist.] June 4, 1992, and *Birdo v. Hol Brook*, 775 S.W.2d 411, 414 (Tex. App.--Fort Worth 1989, Writ denied). These cases in part deal with handwritten briefs and the filing of frivolous or harassing suits which are not relevant to the case before this Court. However, *Cronen, id.*, supports that portion of Petitioners' Point of Error #3 that deals with an appellate review for substance rather than form.

Cronen, id., at page 3, footnote 3, states the following: In *City of San Antonio v. Rodriguez*, 35 Tex. Sup. Ct. J. 536, 537 (February 26, 1992), and *Mueller v. Sararia*, 35 Tex. Sup. Ct. J. 589-90, (March 25, 1992), the court reaffirmed the policy that "the decisions of the courts of appeals [should] turn on substance rather than procedural technicality." *Crown Life Ins. Co. v. Estate of Gonzales*, 820 S.W.2d 121 (Tex. 1991) (per curiam). *Also Grand Prairie Sch. D. v. Southern Parts*, 813 S.W.2d 499, 500 (Tex. 1991). **Note:** TCB, on page 31 of its Respondents' Brief, references *Grand Prairie Sch. D. v. Southern Parts Imports*, 803 S.W.2d 762, 768 (Tex. App.--Dallas 1991, no writ), for authority to support its arguments. It was reckless of TCB to use this case to support its arguments as it had been reversed. *See Grand Prairie*, 813 S.W.2d at 499. Also, the writ history is obviously incorrect. Petitioners have conclusively established that they are entitled to a reversal of the judgment based on Point of Error #3 of the Application for Writ of Error. A detailed list of the false and misleading statements of Respondents' Reply have not been included in the interest of brevity. **PETITIONERS' RESPONSE TO RESPONDENTS' REPLY POINT #4 TO PETITIONERS' POINT OF ERROR #3: THE FIRST COURT OF APPEALS ERRED WHEN IT STRUCK 42 OF THE APPELLANTS' 44 POINTS OF ERROR BASED ON *HENRY S. MILLER MANAGEMENT CORP v. HOUSTON STATE BANK*, 792 S.W.2D 133-135 (TEX. APP.--HOUSTON [1ST DIST.] 1990, WRIT DENIED), AND TRAP 74. (OPINION AT 5).** TCB again attempts to confuse the issue in this case by changing the numbering system. Respondents' statements made in this point are not true and have no basis of law or fact. It is incredible that after over two years of appeals process which did not decide on the merits of 43 of Petitioners' 44 points of error, TCB has proclaimed itself judge and jury and decided there is no merit to Petitioners' appeal. TCB demonstrates that it is requesting that this Court review Appellants' briefs filed on June 17, 1991 and Feb. 13, 1992 in the First Court of Appeals and decide the merits of all of the Petitioners' (Appellants') appeal (44 points of error, June 17, 1991 brief, and all response points, Feb. 13, 1992 brief).

Petitioners agree with TCB that this Court should review Petitioners' (Appellants') appeal filed with the First Court of Appeals in its totality. **PETITIONERS' RESPONSE TO RESPONDENTS' REPLY POINT #5 TO PETITIONERS' POINT OF ERROR #4: THE FIRST COURT OF APPEALS ERRED BY NOT REVERSING THE JUDGMENT AND DISMISSING THE CASE DUE TO THE JUDGMENT RENDERED IN CASE #87-14551 BEING INTERLOCUTORY. (OPINION AT 6).** When TCB uses the terms "duplicative, "difficult to discern" and "nonsensical," it is because they have no legitimate argument to defeat Petitioners' point of error. As usual, TCB starts out by making untrue and misleading statements. It is clear that this point of error is initiated by the ruling of the First Court of Appeals that the 1986 Judgment is interlocutory. Thus, it could not have been raised in the *trial court*. Further, Petitioners clearly show where they made this claim in the appeals court with the reference to Point of Error XI Motion for En Banc Rehearing, Mar. 27, 1992).TCB now take time to argue the merits of its summary judgment "issued" by Judge Wittig. Petitioners have argued and continue to argue that there was no Summary Judgment Order. However, Petitioners would like to take this opportunity to show the Court the following:

1. TCB references First Supp. Tr. 228-229 and Tr. 1358 show they obtained a Summary Judgment.
   NEITHER OF THESE DOCUMENTS MENTIONS BETTE SCHWAGER.
   So, even if they were valid documents, they did not pertain to Bette Schwager.
2. Bette Schwager had a constitutional right to plead and prove her cause of action. *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362, 363 (Tex. 1971).
3. Bette Schwager's claims were for breach of good faith, breach of contract, mental anguish, salary, punitive damages and attorney fees. Tr. 907-935.

4. TCB required Bette Schwager to sign a Homestead Affidavit, thus having actual notice Bruce Schwager was married. (Tr. 929, 930, 931). **Note:** This document alone establishes a contractual relationship with TCB, contrary to its pleadings. (Tr. 811-828).
5. Community property subject to the joint management of both spouses cannot be encumbered by one spouse acting without the other's consent. *Williams v. Portland State Bank*, 514 S.W.2d 124 (Tex. Civ. App.--Beaumont 1974); *Valone v. Miller*, 663 S.W.2d 97, 99 (Tex. App.--Houston [14th Dist.] 1983). Thus, TCB was required to have Bette Schwager sign pledge of "Jow Note." TCB was not entitled to her one half of "Jow Note." One spouse does not have the right to represent the other when the suit directly concerns community property. *Carlton v. Estate of Estes*, 664 S.W.2d 322, 323 (Tex. 1983). In a suit about community property, the rights of the wife may only be affected in suits in which she is called to answer. *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200 202 (Tex. 1974).
6. There was no basis for granting injunction and equitable relief against Bette Schwager as no injunction, equitable or affirmative relief was pled (Tr. 933-991) or proved by TCB against Bette Schwager, *E.A. Nichols v. J.D. Wheeler*, 304 S.W.2d 229, 230 (Tex. Civ. App.--Austin 1957).
7. The Jow Note interest of Bette Schwager was awarded to TCB without her permission. Tr. 1234, 1236.
8. It is undisputed that there was no service made upon Bette Schwager by TCB. TRCP 124. When there is no valid service of process against a defendant, the trial court lacks jurisdiction. *Trans-State Pavers, Inc. v. Haynes*, 808 S.W.2d 727, 728, 735 (Tex. App.--Beaumont 1991).

9. Accordingly, the lack of jurisdiction renders the judgment void. A void judgment's nullity cannot be waived. *Starne v. Holloway*, 779 S.W.2d 86 (Tex. App.--Dallas 1989).

The following will show that the alleged summary judgment issued by Judge Wittig is not valid:

1. The only evidence of any kind that could possibly show the existence of a summary judgment is the docket sheet entry. (Tr. 1358). The docket sheet is not evidence of any judgment being rendered. *Miller v. Kendall*, 804 S.W.2d 933, 943, 944 (Tex. App.--Houston [1st.Dist.] 1990).
2. In order for a judgment to be valid, it must be signed or orally pronounced in court with a record made of this announcement. *Dunn v. Dunn*, 439 S.W.2d 830, 823-833 (Tex. 1969) There is no record showing that the judgment was orally announced in open court.
3. The summary judgment, if valid as TCB contends, would not have been final, as the judgment would have been partial and thus interlocutory.
4. Summary judgment, if in fact there was one, was interlocutory and thus would be set aside when evidence was entered into record. *Hays v. Sullins*, 442 S.W.2d 494, 496 (C.A. Texas--El Paso 1969).

TCB does not controvert the main elements of this point of error. Respondents in their answer have opened the door that should allow an evaluation for merit of the 43 points of error that were stricken by the First Court of Appeals. TCB has used this answer to try to influence this Court on other elements of this appeal. After having accomplished this, it then makes a complaint about Petitioners' tactics, an argument it should have made at the beginning of this reply point instead of arguing the validity of the summary judgment which affected many elements of the appeal filed in the First Court of Appeals. TCB's attempt to discredit Petitioners is not a valid argument against Petitioners' Point of Error #4.

Petitioners restate that this point of error was triggered by the First Court of Appeals' ruling that the judgment rendered in Case #86-07376 was interlocutory. The judgment entered in Case #87-14557 does not specifically include the judgment rendered in Case #86-07376. This is required by law if the 1986 judgment was not final. **PETITIONERS' RESPONSE TO RESPONDENTS' REPLY POINT #6 TO PETITIONERS' POINT OF ERROR #5: THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT FOR APPELLEES BY STRIKING POINT OF ERROR #7. FURTHER, THE TRIAL COURT ERRED BY REFUSING TO SUBMIT SPECIAL ISSUES TO THE JURY AS REQUESTED BY SCHWAGERS. (OPINION AT 5).** A review of Respondents' Reply establishes the need for this Court to review all of the 44 points of error for merit. In Appendix III of Petitioners' Application for Writ of Error, a detailed review of the stricken points of error is made, as to how it relates to the First Court of Appeals' ruling. TCB, knowing that it has no legitimate argument to refute Section A of Petitioners' Point of Error #5 in Application, has ignored same. Section A relates only to the briefing rules. TCB's statement about being allowed only two briefing chances is baseless. All legal and factual claims made in Petitioners' Point of Error #5 (#7 Appeal Brief) have merit. A reading of Respondents' reply demonstrates this. TCB's reply is basically the reply it made in its Appellees' Brief (July 29, 1991), which was answered by "Schwagers" in their Appellants' Response Brief. Point of Error #5 in Application for Writ of Error was based on the following documents: Appellants Opening Brief (June 17, 1991), Appellees Reply Brief (July 29, 1991), Appellants' Response Brief (Feb. 13, 1992), and Motion for En Banc Rehearing (March 27, 1992), among other things. Thus, most of the claims made here by TCB will have been answered by the conclusiveness of Petitioners' Point of Error #5 (#7 Appeal Brief). However, Petitioners believe certain salient points should be addressed at this time. The TCB lawsuit is based on the proper acceleration of the B.B.M.M., Ltd. note. As their acceleration was *improper*, there is no legal basis for TCB's lawsuit.

The law on acceleration has been clearly stated by the Texas Supreme Court in *Ogden v. Gibraltar Sav. Ass'n*, 643 S.W.2d 232, 233, 234 (Tex. 1982). 1. Note holder must present note and demand for payment

prior to exercising his right to accelerate.

2. Must afford mortgagor an opportunity to cure the default prior to acceleration.
3. Must give mortgagor notice of intent to accelerate prior to acceleration.

It is undisputed that TCB did not meet the requirements of the Texas Supreme Court when it wrongfully accelerated the note. The wrongful acceleration is detailed in Petitioners' Point of Error #5 in their Application. However, Petitioners again state that Judge Wittig also ignored this Court's decisions when he issued a directed verdict based solely on the disputed fact that Schwager knew the note had been unpaid since January 19, 1987. (Acceleration was done on March 20, 1987). S.F. Vol. 11-21-89, pp. 253-256). This was accomplished even though Judge Wittig acknowledged the inadequacy of TCB's promissory note. (S.F. 1597, LL. 7-9). It is made abundantly clear in *Ogden* that knowledge of default does eliminate the requirements shown in the preceding (1,2,3). *Ogden* states on page 233 the following: **IT IS UNDISPUTED OGDEN WAS IN DEFAULT ON HIS NOTE PAYMENTS.** Exhibit G contains some of the false and misleading statements made by TCB in Reply Point #6. TCB's reference to *Collara v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978), is misplaced. In *Collara*, the Court held that there was *no evidence*; thus, reasonable minds could not differ. In the instant case, Bruce Schwager testified under oath that the documents had been forged. (Borrower's Statement Deed of Trust). Also, Bill of Exception was made on Schwagers handwriting expert's testimony. S.F. 1697. Mr. Nixon, Schwager's trial attorney, objected to TCB's handwriting expert. S.F. 1218. Petitioners are convinced that if the Texas Supreme Court reviews Point of Error #5 of Application for Writ of Error on its merit, the Court will reverse judgment in this case.

CONCLUSION

Schwager Parties filed adequate briefs in compliance with TRAP and decisions made by this Court. Therefore, Petitioners did not waive any of the 44 points of error. It is clear that the First Court of Appeals denied Petitioners their legal right to an appeal by striking 43 of their 44 points of error. The one point of that was not stricken was one of fundamental error on jurisdiction. This point would also have been stricken had it not been one of fundamental error. Thus, the First Court of Appeals effectively denied Petitioners' right of appeal as previously shown by referenced U.S. and Texas Supreme Court cases. The Application for Writ of Error made to this Court alone is sufficient to grant the relief requested by Schwagers. TCB and the Limiteds have opened the door for this Court to review the stricken points of error for merit, or, in the alternative, refer this case to the appeals court to accomplish this review. Respondents have opened the door for this action by the following:

1. TCB's Reply Point #4 of its reply brief attempts to demonstrate that the stricken points of error were without merit. Also, the striking of these points of error was harmless.
2. Limiteds submitted their appeals brief in the Supreme Court. This brief was an attempted rebuttal to all 44 points of error.

Note: Petitioners have included in Exhibit H the answer to Limited Appellees' brief that was contained in Appellants' Response Brief filed Feb. 13, 1992.

PRAYER FOR RELIEF

Wherefore, Petitioners "Schwagers" request that the relief requested in the Application for Writ of Error (dated May 21, 1992) be granted. Petitioners respectfully request such other and further relief to which they may be justly entitled.

Respectfully submitted,

T. Ransom Cornish
State Bar No. 04836100
3131 Eastside, Suite 330
Houston, Texas 77098
Telephone(713) 528-1937
Fax: (713) 523-0547
ATTORNEY FOR
PETITIONERS

CERTIFICATE OF SERVICE

I, T. Ransom Cornish, certify that a true and correct copy of the foregoing was sent to Joseph D. Cheavens, One Shell Plaza, 910 Louisiana, Houston, Texas 77002, Neil S. Levin, 4828 Loop Central Drive, Suite 710, Houston, Texas 77081, and Newton B. Schwartz, 723 Main, Suite 325, Houston, Texas 77002 by United States mail, postage prepaid, on this the 3rd day of August, 1992.

_____

T. Ransom Cornish

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Bruce B. Schwager, known to be person whose name is subscribed to the foregoing instrument as Petitioner who, after being by me duly sworn, on his oath, did depose and testify that he read the foregoing instrument, that all of the facts alleged therein are true and correct and within his own personal knowledge.

_____

Bruce B. Schwager

SUBSCRIBED AND SWORN TO on this the 3rd day of August, 1992, to certify which witness my hand and seal of office.

_____

NOTARY PUBLIC IN
AND FOR THE STATE
OF TEXAS

My commission expires:

_____

APPENDIX 1

Supreme Court Justices Contributions--1988 thru 1990

Firm Name:	Cook	Cornyn	Doggett	Gammage	Gonzalez	Hecht	Hightower	Mauzy	Phillips
Abraham, Watkins et al.,			$3025	$10100				$18277	
Akin, Gump et al.,		$5950			$7650	$5625		$1500	$15675
Andrews & Kurth	$650	$8475	$25	$1000	$650	$3200			$29725
Arnold, White et al.,		$1025			$500				$8225
Baker & Botts	$14357	$17575		$19433	$23175	$7300	$1500		$113867
Baldwin & Baldwin			$5000	$11000	$5000			$45500	
Baron & Budd			$1265	$5000			$2000	$35985	
Bracewell & Patterson	$16225	$8100	0	$5630	$4075	$250	$6150		$56497
Brown, Maroney et al.,	$1000	$1800	$700		$2600	$200			$7200
Butler & Binion	$1400	$6650		$4200		$1350			$10960
Cantey & Hanger	$6300	$1350	$100	$1400	$7625	$5200			$12375
Carrington, Coleman et al.,	$300	$250			$200	$1275			$4525
Chamberlain, Hrdlicka et al.,	$350	$250		$6313	$50	$100			$4965
Clark, Thomas et al.,	$100	$1535		$2200	$725	$3000			$15570
Cowles & Thompson	$2100	$2000	$50		$100	$1000	$1000		$7380
Crain, Caton & James	$1500	$3000							$12225
Doherty & Williamson		$5000		$2000				$17000	$2000
Edwards & Terry			$5000				$3000	$10260	

Supreme Court Justices Contributions--1988 thru 1990

Firm Name:	Cook	Cornyn	Doggett	Gammage	Gonzalez	Hecht	Hightower	Mauzy	Phillips
Ernest Cannon et al.,			$5000	$10500				$20000	
Fisher, Gallagher et al.,	$5000		$1000	$15000			$3500	$30250	$6000
Fulbright & Jaworski	$6675	$10000		$5450	$3635	$750	$2735		$51020
Gardere & Wynne	$5200	$5100		$5000	$200	$5850			$8975
Glenn Vickery et al.,			$2500	$35121			$1000	$2000	
Graves, Dougherty et al.,	$500	$5225	$1725	$7450	$2800	$100	$1000		$15262
Grece, Locke & Hebdon	$2200	$11750	$100		$13825	$700			$15710
Hardy, Milutin & Johns			$5000	$7500			$5000	$14000	
Haynes & Boone	$5100	$8535		$3000		$7650	$2500		$22815
Helm, Pletcher et al.,	$5000		$10125	$21000	$600		$5500	$53500	

Total Contributions

Firm Name:	
Abraham, Watkins et al.,	$31,402.00
Akin, Gump et al.,	$36,400.00
Andrews & Kurth	$43,700.00
Arnold, White et al.,	$9,750.00
Baker & Botts	$197,209.00
Baldwin & Baldwin	$66,500.00
Baron & Budd	$55,635.00
Bracewell & Patterson	$97,627.00
Brown, Maroney et al.,	$12,800.00
Butler & Binion	$20,460.00
Cantey & Hanger	$37,050.00
Carrington, Coleman et al.,	$7,950.00
Chamberlain, Hrdlicka et al.,	$5,715.00
Clark, Thomas et al.,	$27,293.00
Cowles & Thompson	$15,780.00
Crain, Caton, & James	$16,725.00
Doherty & Williamson	$29,000.00
Edwards & Terry	$38,260.00
Ernest Cannon et al.,	$35,500.00
Fisher, Gallagher et al.,	$60,750.00
Fulbright & Jaworski	$80,265.00
Gardere & Wynne	$30,325.00
Glenn Vickery et al.,	$40,621.00
Graves, Dougherty et al.,	$34,062.00
Groce, Locke & Hebdon	$44,285.00
Hardy, Milutin & Johns	$31,500.00
Haynes & Boone	$49,600.00
Helm, Pletcher et al.,	$95,725.00

APPENDIX J

The State of Texas
Sharolyn Wood
Judge, 127th District Court
Harris County Courthouse
Houston, Texas 77008

February 12, 1993
2:00 p.m.

TO: JUDGES IN HARRIS COUNTY

The following phone message was just received from the Clerk of the Fifth Circuit Court of Appeals:

"Late yesterday afternoon, the Fifth Circuit Court of Appeals granted rehearing in Lulac v. Clements on its own motion and vacated the panel opinion. Oral arguments are set for the week of May 24th. The exact date has not yet been set. No additional briefing has been requested. One more developement--there're coming fast. There was a settlement meeting set for next Tuesday. That meeting had been cancelled by the plaintiffs prior to us receiving this message. The reason given for the cancellation was a trial conflict for one of the plaintiff's counsel. We continue to hear that the attorney general is working on settlement proposals. We have not been invited. At the meeting with Gene and Mike at lunch, there was a consensus reached that while the judges as a group may not totally agree on specific details to fix the current system, we do agree that small subdistricts using legislative district are politicized, problems from campaign contributions not being solved, judges being placed in power struggles with politicians from the same district, and the increase in power of special interest groups to attempt to influence legal decisions. Your input is still sought. I am writing up a proposal and will send you a copy.

That's all for now. Sharolyn

APPENDIX K

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Bruce B. Schwager, known to be the person whose name is subscribed to the foregoing instrument as Petitioner who, after being by me duly sworn, on his oath, did depose and testify that he had read the foregoing instrument, that all of the facts alleged therein are true and correct and within his own personal knowledge.

Bruce B. Schwager

SUBSCRIBED AND SWORN TO on this the 29th day of March 1993, to certify which witness my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:

December 11, 1993

GERALD A. ANHALT
Notary Public
STATE OF TEXAS
My Comm. Exp. DEC 11, 1993